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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1991

NATHAN A. RICE, BOBBY R. WATSON and BOB SEYMOUR,
Petitioners,

v.

JAMES CALVIN MITCHELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY GRAFTING THE SUBJECTIVE COMPONENT OF ***WILSON v. SEITER*** ONTO THE PURELY OBJECTIVE STANDARD OF ***HARLOW v. FITZGERALD***, THEREBY DENYING QUALIFIED IMMUNITY AND CREATING A SEPARATE OFFENSIVE THEORY OF LIABILITY IN DIRECT CONTRAVENTION OF RULINGS OF THIS COURT?

II. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY APPLYING THE REPUDIATED "LEAST RESTRICTIVE ALTERNATIVE" TEST, RATHER THAN THE FOUR-PRONG ANALYSIS REQUIRED BY ***TURNER v. SAFLEY***, THEREBY DENYING QUALIFIED IMMUNITY IN A CLAIM ARISING FROM DENIAL OF OUT-OF-CELL EXERCISE PRIVILEGES TO A VIOLENTLY ASSAULTIVE INMATE WHEN LESSER MEASURES HAD BEEN REPEATEDLY ATTEMPTED AND CONSISTENTLY FAILED?

III. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY FAILING TO APPLY THE PARTICULARIZED STANDARD OF REVIEW FOR A QUALIFIED IMMUNITY DEFENSE REQUIRED BY ***ANDERSON v. CREIGHTON?***

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, officials of the North Carolina Department of Correction, pray that this Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, decided January 10, 1992, which affirmed the district court's denial of qualified immunity.

OPINIONS BELOW

The order of the Court of Appeals for the Fourth Circuit denying the petition for rehearing and suggestion for rehearing in banc in this case may be found in the appendix (App.) to this petition at App. A127.

The opinion of the Court of Appeals for the Fourth Circuit in this matter, affirming the district court's denial of qualified

immunity, is reported at ***Mitchell v. Rice,*** 954 F.2d 187 (4th Cir. 1992), and may be found in the appendix at App. A113.

The opinion of the district court denying qualified immunity, ***Mitchell v. Rice***, No. 86-235-CRT (E.D. N.C. Feb. 1, 1990) (unpublished), may be found in the appendix at App. A109.

A prior opinion of the Court of Appeals for the Fourth Circuit in this matter, ***Mitchell v. Martin***, 867 F.2d 609 (4th Cir. 1989) [Table], which vacated the district court's entry of summary judgment for petitioners, may be found in the appendix at App. A34.

The initial opinion of the Court of Appeals for the Fourth Circuit in this matter, ***Mitchell v. Martin***, 836 F.2d 546 (4th Cir. 1987) [Table], may be found in the appendix at App. A28.

The magistrate judge's memorandum and recommendation, which granted summary judgment to the petitioners, and the district court's adoption of that memorandum and recommendation, ***Mitchell v. Martin,*** No. 86-235-CRT (E.D.N.C. July 20, 1987 and August 12, 1987) (unpublished), may be found in the appendix at App. A19.

STATEMENT OF JURISDICTION

The decision of the Fourth Circuit Court of Appeals denying the petitioners' petition for rehearing and suggestion for rehearing en banc was filed on February 28, 1992. (App. A127). The time for filing this petition, which was originally due ninety days after February 28, 1992, or on May 28, 1992, was extended by order of Chief Justice Rehnquist, to and including June 27, 1992. (App. A129). Jurisdiction of the Court is, thus, invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. N.C. Admin. Code tit. 5, r. 2C .0303 *et seq.*:[1]

The original and amended versions of these regulations may be found in the appendix at App. A130, A145.

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1 Because this regulation was amended between respondent's first and second restricted exercise periods, both versions are included.

STATEMENT OF THE CASE

The undisputed facts of this case, as found by the Fourth Circuit Court of Appeals, are as follows:

In December 1973, respondent James Calvin Mitchell (hereinafter "Mitchell") began serving a thirty-year sentence for second degree murder and a consecutive five to ten-year sentence for armed robbery. (App. A1). During this incarceration, Mitchell was convicted of further crimes. On April 23, 1975, Mitchell was convicted of assault with a deadly weapon with intent to kill resulting in serious injury, for which he received a three-year concurrent sentence. (App. A1). On November 10, 1975, Mitchell was convicted of attempted escape from prison, for which he received a four-month concurrent sentence. (App. A1). On October 14, 1980, Mitchell was convicted of assault with a deadly weapon inflicting serious injury, for which he received a twelve-month concurrent sentence. (App. A1). On July 11, 1983, Mitchell assaulted two inmates in a dayroom, for which he was later convicted on two counts of assault with a deadly weapon with intent to kill inflicting serious injury. He received consecutive sentences of ten and twenty years for these convictions. (App. A2). From 1973 to 1986, Mitchell incurred over seventy-six prison rule infractions, many of which were assaultive in nature. (App. A2).

At the time of Mitchell's July 11, 1983 assaults, he was in the most restrictive custody level in the North Carolina prison system -- maximum custody, assigned to intensive management at Central Prison. (App. A2-A3). Intensive management (later renamed "maximum custody") is used to isolate inmates who "pose an imminent threat to the life or health of other inmates or the staff...." N.C. Amin. Code tit. 5, r. 2C .0401 (Dec. 1984). (App. A3, A37). These same prison regulations provide that inmates who are assigned to intensive management may be

further restricted as to their outside cell activities "[i]n any instance where an inmate has seriously assaulted or threatened to assault staff or other inmates if allowed outside the cell...." r. 2C .0300(d)1. (App. A38, A134, A148). Further restrictions authorized, if the initial restrictions fail to resolve an inmate's threatening and dangerous behavior, include outside cell activities only while restrained in hand and leg cuffs and, finally, total restriction on out-of-cell activities except for showers. (App. A38, A134-A135, A148-A149). If total out-of-cell restrictions are imposed, notice and a hearing are provided. Id.

As a result of Mitchell's July 11, 1983 assaults, Mitchell was placed in full restraints (hand and leg cuffs) any time he was outside his cell. Despite these further restrictions, Mitchell's assaultive behavior continued unabated. On July 24, 1983, while exercising in full restraints in the dayroom of the maximum custody cellblock, Mitchell attempted to break the window of the Control Station with a broom handle. (App. A3). This behavior led Bobby R. Watson, Associate Warden for Operations at Central Prison (hereinafter "Watson") to recommend that Mitchell be restricted to his cell except for showers in full restraints. (App. A3). After notice and a hearing, these restrictions were approved by the Director's Subcommittee on July 28, 1983, with review scheduled and given every thirty days. (App. A3, A39). Pursuant to standard operating procedures, Mitchell was provided an exercise manual demonstrating in-cell exercises.

Seven months later, on February 29, 1984, Mitchell's out-of-cell exercise privilege was restored, but Mitchell, still considered quite dangerous, was placed in full restraints whenever he was out of his cell. (App. A3).

One year later, on February 26, 1985, Mitchell resumed his assaultive behavior by again attempting to break the window in the Control Station with a mop wringer, after refusing to return

to his cell. (App. A4). The out-of-cell exercise restrictions were again imposed by the Director's Classification Committee (formerly the Director's Subcommittee) on April 3, 1985. (App. A4).

Eleven months later, on March 14, 1986, the out-of-cell exercise restrictions were lifted and Mitchell was transferred to Caledonia Correctional Institution. (App. A4).

During the two periods of out-of-cell exercise restrictions Mitchell did not file any grievances complaining about his health or medical problems and his medical records do not reveal any injuries attributable to his restrictions. (App. A39-A40).

Mitchell filed this civil action *pro se* on March 3, 1986, in the United States District Court for the Eastern District of North Carolina, Raleigh Division, against Governor James Martin (hereinafter "Governor Martin"); Nathan Rice (hereinafter "Warden Rice"), who was at that time the Warden of Central Prison in Raleigh, North Carolina; Bobby Seymour (hereinafter "Seymour"), who was a Program Director for Classification at Central Prison; and Bobby R. Watson (collectively "defendants"). On July 28, 1986, the defendants filed motions to dismiss and for summary judgment, supported by a brief and affidavits. On July 20, 1987, the Honorable Charles K. McCotter, Jr., United States Magistrate Judge, recommended summary judgment be granted defendants. (App. A19). The magistrate judge's recommendation was adopted by the Honorable W. Earl Britt, United States District Judge, on August 12, 1987. (App. A26). Mitchell timely appealed.

On December 17, 1987, the Fourth Circuit Court of Appeals affirmed the judgment of the district court in all respects, with the exception of Mitchell's claim that the restrictions the

defendants had placed on his out-of-cell exercise privileges violated his Eighth Amendment rights. (App. A28).

Defendants moved for an extension of time to petition for rehearing, which was granted. (App. A32(a)). On January 13, 1988, defendants filed a petition for rehearing, which was granted on February 29, 1988, and thereafter appellate counsel was appointed for Mitchell. (App. A33).

On January 12, 1989, the Fourth Circuit Court of Appeals vacated the entry of summary judgment on Mitchell's claim of denial of out-of-cell exercise privileges and remanded the case to the district court "for the development of additional facts on this issue, particularly whether the plaintiff offered any proof of injury...." (App. A34, A36).

On January 23, 1989, Warden Rice, Seymour and Watson filed an answer, specifically asserting the defense of qualified immunity.[2] The defendants filed a renewed motion for summary judgment, supported by a brief and extensive affidavits concerning documentation of the restrictions on Mitchell's out-of-cell exercise privileges and his medical records, specifically raising their defense of qualified immunity.

On August 9, 1989, the district court denied without prejudice defendants' renewed motion for summary judgment, without addressing their defense of qualified immunity. (App. A104, A106).

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2 Governor Martin was dismissed from this action by the district court and that dismissal was affirmed by the Fourth Circuit Court of Appeals on the first appeal. (App. A32).

On December 12, 1989, Mitchell moved to amend his complaint in order to name the remaining defendants in their individual as well as official capacities. Mitchell also sought to add additional defendants and further relief.

On February 1, 1990, the district court filed an order denying qualified immunity and allowing Mitchell to amend his complaint. (App. A109). On February 12, 1990, the defendants filed notice of appeal based on the district court's denial of qualified immunity. (App. A112).

On January 10, 1992, the Fourth Circuit Court of Appeals entered an opinion affirming the district court's denial of qualified immunity. (App. A113). The defendants timely petitioned for rehearing with suggestion for rehearing *en banc*. On February 28, 1992, the Fourth Circuit Court of Appeals entered an order denying defendants' petition for rehearing. (App. A127).

The defendants thereafter moved for an extension of time to petition for a writ of certiorari, which was granted on May 12, 1992. (App. A129).

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT COURT OF APPEALS ERRED BY GRAFTING THE SUBJECTIVE COMPONENT OF ***WILSON V. SEITER*** ONTO THE PURELY OBJECTIVE STANDARD OF ***HARLOW V. FITZGERALD***, THEREBY DENYING QUALIFIED IMMUNITY AND CREATING A SEPARATE OFFENSIVE THEORY OF LIABILITY IN DIRECT CONTRAVENTION OF RULINGS OF THIS COURT.

The Fourth Circuit Court of Appeals denied qualified immunity to the defendant prison officials, holding that inquiry into the constitutionality of their actions in the case at bar "would be better accomplished by a trial judge after a full hearing on the facts." ***Mitchell v. Rice***, 954 F.2d at 193. The Court of Appeals then cited to this Court's most recent Eighth Amendment decision, ***Wilson v. Seiter***, 501 U.S. ___, 111 S. Ct. 2321 (1991), for the proposition that this hearing would require inquiry into the prison officials' state of mind when they imposed the exercise restrictions on Mitchell. 954 F.2d at 193 n. 6. By taking this approach, the Fourth Circuit Court of Appeals has grafted the subjective component of ***Wilson v. Seiter*** onto the purely objective standard of ***Harlow v. Fitzgerald***, 457 U.S. 800 (1982), thereby repudiating ***Harlow's*** elimination of a subjective intent component as a separate inquiry in a qualified immunity defense.

In ***Mitchell v. Forsyth***, 472 U.S. 511 (1985), this Court clearly stated that, when resolving a defense of qualified immunity, a trial court "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim," as the question of immunity "is separate from the merits of the underlying action." 472 U.S. at 528. The threshold question for the trial court, thus,

is not whether the plaintiff's constitutional rights may have been violated, but rather, what was the clearly established law at the time of the defendants' actions and was that law sufficiently particularized to have given the defendants notice that their actions may violate the plaintiff's constitutional rights.

This Court specifically noted in ***Harlow v. Fitzgerald***, 457 U.S. 800 (1982), that the objective reasonableness standard of review was established because "questions of subjective intent so rarely can be decided on summary judgment" and the defense of qualified immunity shields public officials from "wide-ranging discovery" and trial, not merely liability. 457 U.S. at 816-18. ***Accord Mitchell v. Forsyth***, 472 U.S. at 526-27. Thus, even an allegation of malice will not suffice to negate the defense of qualified immunity. ***Harlow***, 457 U.S. at 817-18.

If the Fourth Circuit Court of Appeals is correct in saying that this case should go to trial on the merits, then the question of the defendant prison officials' subjective intent would be relevant concerning the issue of deliberate indifference. ***Wilson v. Seiter***, 501 U.S. at ___, 111 S. Ct. at 2324-25. The defendants contend, however, that this would be purely an additional theory of defense, not -- as the Fourth Circuit Court of Appeals would have it -- an alternate and independent theory of liability. When a court is determining the threshold question of qualified immunity, there is no subjective element -- the issue is purely a legal one. The defendants perceive the subjective element of ***Wilson v. Seiter*** to be a matter purely of defense, not an alternative theory for prisoners to utilize to bypass ***Harlow v. Fitzgerald*** and ***Turner v. Safley***, 482 U.S. 78 (1987), to get to a jury. Under ***Seiter***, only if an actual constitutional violation is established does the focus shift to the subjective intent of the defendants. Even assuming such violation, if the defendants are not shown to have been deliberately indifferent -- failing to take reasonable

ameliorating actions readily available to them, for example -- then plaintiff's claim nonetheless fails.

The effect of the Fourth Circuit Court of Appeals' use of the ***Seiter*** subjective element is to re-establish a separate theory of potential liability which a plaintiff can plead affirmatively and which will in effect eliminate qualified immunity. The Ninth Circuit Court of Appeals has recently recognized that the subjective element of ***Seiter*** is an additional barrier to a prisoner's Eighth Amendment claim. ***McKinney v. Anderson***, 959 F.2d 853 (9th Cir. 1992). This conflict in application of ***Seiter***, and especially the Fourth Circuit's application of its disastrous version to a defense of qualified immunity, will continue until this Court makes clear the substantive and procedural posture of the subjective element. Is the subjective element only a shield for defendants or, as employed by the Fourth Circuit in the case at bar, is it a separate sword to be wielded by plaintiffs?[3] The Court should allow this petition to address this important constitutional issue.

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3 *See*, i.e., Justice Kennedy's analysis of "the tension between the rationale of ***Harlow***" and a claim containing intent as an element. ***Siegert v. Gilley***, ___ U.S. ___, 111 S. Ct. 1789, 1795 (1991).

II. THE FOURTH CIRCUIT COURT OF APPEALS ERRED BY APPLYING THE REPUDIATED "LEAST RESTRICTIVE ALTERNATIVE" TEST, RATHER THAN THE FOUR-PRONG ANALYSIS REQUIRED BY *TURNER v. SAFLEY*, THEREBY DENYING QUALIFIED IMMUNITY IN A CLAIM ARISING FROM DENIAL OF OUT-OF-CELL EXERCISE PRIVILEGES TO A VIOLENTLY ASSAULTIVE INMATE WHEN LESSER MEASURES HAD BEEN REPEATEDLY ATTEMPTED AND CONSISTENTLY FAILED.

The holding of the Fourth Circuit Court of Appeals forces prison officials to act at their peril when they restrict an inmate's out-of-cell exercise privileges, pursuant to prison regulations, even if the inmate is violently assaultive and continuously unmanageable. Moreover, the decision precludes qualified immunity as a defense, even in the absence of any injury to the inmate.

The court reached this holding by applying a "least restrictive alternative" analysis, in direct contradiction to this Court's majority ruling in ***Turner v. Safley***, 482 U.S. 78 (1987), and relying instead on Justice Stevens' dissenting opinion. *See*, i.e., ***Mitchell v. Rice***, 954 F.2d at 193 and n. 5 ("A detailed review of the feasibility of alternatives in this case, such as solitary out-of-cell exercise periods, or the adequacy of in-cell exercise would need to precede a grant of qualified immunity in a case such as this."). A review of the record reveals that graduated, measured alternatives, including solitary out-of-cell exercise periods, were attempted by the prison officials in this case prior to the imposition of the prohibition of all Mitchell's out-of-cell exercise. (App. A2-A4). These alternatives consistently failed

to curb Mitchell's assaultive behavior, necessitating the final measure of a prohibition on all out-of-cell exercise.

Not only did the Fourth Circuit Court of Appeals erroneously reject the four-prong ***Turner*** analysis, but compounded the error by placing the burden on defendants to show the absence of reasonable, less restrictive alternatives. This shifting of the burden clearly violates this Court's holding in ***Turner***. Prison officials "do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." 428 U.S. at 90-91.

Defendants further assert that ***Turner v. Safley*** and ***Wilson v. Seiter*** are readily interconnected. If prison officials apply in a rational fashion the four-prong ***Turner*** analysis to their discretionary decisions regarding internal security, only in rare instances could they be held to have acted with deliberate indifference to conditions which might violate the Constitution. This process of conscious application of the four prongs all but eliminates deliberate indifference. Moreover, when prison officials must exercise their discretion, courts are directed to defer to that discretion in the absence of totally unreasonable acts. Thus, when prison officials exercise their discretion within objectively reasonable bounds, as did the defendants in the case at bar, they must be granted qualified immunity.

Defendants contend that a proper application of the four-prong standard of review [4] established by this Court in ***Turner***

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4 The four prongs are: (1) whether there exists a logical connection between the regulation and the legitimate governmental interest upon which it is based, (2) whether there are alternative means of exercising the right the regulation

v. Safley, a review the defendants presented but the Fourth Circuit Court of Appeals refused to apply, results in a grant of qualified immunity to them.

III. THE FOURTH CIRCUIT COURT OF APPEALS ERRED BY FAILING TO APPLY THE PARTICULARIZED STANDARD OF REVIEW FOR A QUALIFIED IMMUNITY DEFENSE REQUIRED BY *ANDERSON v. CREIGHTON*.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court held that the general rule of qualified immunity is to provide government officials with the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages." 483 U.S. at 639, citing to *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Thus, the standard of review a court must apply when determining whether the law was clearly established is a "particularized" determination, i.e., whether the "contours of the right [are so] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "[I]n the light of pre-existing law the unlawfulness must be apparent." Id.

The Fourth Circuit Court of Appeals specifically noted in its opinion that it had "never held that denial of out-of-cell exercise opportunities is per se unconstitutional cruel and unusual punishment." *Mitchell v. Rice*, 954 F.2d at 191. In fact, the court

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(Footnote continued)
restricts or prohibits, (3) the impact accommodation of the asserted constitutional right will have on staff and other inmates, and (4) other alternatives to the restrictions imposed. 482 U.S. at 89-90.

held the following to be the "clearly established" law in their opinion:

> [P]recedent from this and other circuits clearly establish that depriving inmates of all meaningful opportunities to exercise generally violates the Eighth Amendment prohibitions against cruel and unusual punishment. Exceptions may be made under exigent circumstances that necessitate constriction of these rights.

954 F.2d at 193.

The precedent in the Fourth Circuit upon which the court relied includes ***Clay v. Miller***, 626 F.2d 345 (4th Cir. 1980), ***Kirby v. Blackledge***, 530 F.2d 583 (4th Cir. 1976), and ***Sweet v. South Carolina Dept. of Corrections***, 529 F.2d 854 (4th Cir. 1975). None of these cases sets forth any clear rule of law upon which a prison official could base a discretionary decision. ***Clay v. Miller*** stated that "courts must look at the totality of the circumstances, including the extent to which the restrictions adversely affect the mental or physical health of the inmate...." 626 F.2d at 347. ***Kirby v. Blackledge*** held that the totality of conditions may constitute an Eighth Amendment violation and, in dicta, held that inadequate exercise could reach the level of cruel and unusual punishment, but remanded to the district court for a determination of whether "the combination of conditions and circumstances alleged really amounted to cruel and unusual punishment...." 530 F.2d at 587. ***Sweet v. South Carolina Dept. of Corrections*** held that "indefinite limitation on exercise *may* be harmful to a prisoner's health, and, if so, would amount to 'cruel and unusual' punishment...." 529 F.2d at 566 (emphasis added).

Thus, the Fourth Circuit precedent upon which the prison officials in this case had to rely instructed that it was a totality of

circumstances test which controlled and that actual injury was the single factor which could -- alone -- signal a constitutional violation. The facts adopted in the case at bar by the Fourth Circuit Court of Appeals revealed that Mitchell suffered no actual injury and that his only complaint was lack of out-of-cell exercise. Further, he did not complain of the totality of his conditions of confinement, nor does the record reflect that Mitchell ever submitted a grievance or any other formal or informal complaint about the effect of the lack of out-of-cell exercise, and his medical records reflect no injury or illness attributable to the exercise restrictions. Accordingly, Fourth Circuit precedent could not have placed the prison officials on notice that they might be violating Mitchell's constitutional rights.

The only case from this Court which gave any direction to the prison officials is ***Rhodes v. Chapman***, 452 U.S. 337 (1981). ***Rhodes*** also employed a totality of circumstances standard, holding that only conditions which "resulted in unquestioned and serious deprivations of basic human needs" would constitute an Eighth Amendment violation. 452 U.S. at 347. ***Rhodes*** went on to hold, however, that conditions could be "restrictive and even harsh." Id.

This Court has repeatedly noted in its prison cases that the issue of internal security is one best left to the informed discretion of prison officials.

> [J]udgments regarding prison security "are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."

Turner v. Safley, 482 U.S. at 86, citing to ***Pell v. Procunier***, 417 U.S. 817, 827 (1974). *Accord* ***Procunier v. Martinez***, 416 U.S. 396 (1974); ***Jones v. North Carolina Prisoners' Union***, 433 U.S. 119 (1977); ***Bell v. Wolfish***, 441 U.S. 520 (1979); ***Rhodes v. Chapman***, *supra*; ***Block v. Rutherford***, 468 U.S. 576 (1984); ***Whitley v. Albers***, 475 U.S. 312 (1986).

Based on the established law of this Court and the Fourth Circuit when Mitchell's out-of-cell exercise was prohibited,[5] it is clear that the "particularized" guidance required by ***Anderson v. Creighton*** was not available to the defendants in reaching their decision to impose the exercise restrictions. The relevant case law established that an Eighth Amendment violation occurred only if the conditions caused injury or resulted in a denial of a basic human need. Mitchell was neither injured nor so denied.

The defendants were charged with the formidable task of striking a balance between the safety and security of the prison staff and other inmates and the welfare of Mitchell, in the face of no particularized legal precedent. The defendants attempted a measured approach to the problem, but lesser measures were not effective. When persuasion and reward proved miserably ineffective, the unpleasant but necessary recourse of pure restraint was employed and proved effective.

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5 For purposes of determining whether a constitutional right was clearly established, the court may look to the law of the relevant circuit at the time of the conduct in question, ***Davis v. Scherer***, 468 U.S. 183, 191-92 (1984), and this Court.

Prison officials are not required to anticipate changes in the law. ***Wallace v. King***, 626 F.2d 1157 (4th Cir. 1980), *cert. denied*, 457 U.S. 969 (1981). In light of the Fourth Circuit Court of Appeals' holdings in ***Sweet, Kirby*** and ***Clay***, and this Court's holding in ***Rhodes***, it was reasonable for the defendant prison officials to believe that they were not violating Mitchell's Eight Amendment rights by prohibiting out-of-cell exercise so long as he did not suffer any actual injury and the totality of his conditions of confinement were not substandard. That was how the district court initially interpreted the case law when it granted summary judgment to the defendants. (App. A23). That is why the defendants should have been granted qualified immunity.[6]

This Court has stated that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." ***Malley v. Briggs***, 475 U.S. 335, 343 (1986). The defendant prison officials in the case at bar can be accused of neither in light of the acknowledged facts. As recently noted in ***Hunter v. Bryant***, 502 U.S. ___, ___, 112 S. Ct. 534, 537 (1991), "[t]his accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." The defendant prison officials in a maximum custody prison, faced with a discretionary decision regarding security, armed with regulations which provided an effective solution, especially in light of no particularized, clearly established law, should not hesitate to act in the fear that some court

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6 How can these defendant prison officials be held to know that their conduct may have violated clearly established law when a federal judge and a magistrate judge have found their actions in this case constitutional? (App. A19, A26-A27).

may, years after the fact, fashion "another reasonable, or more reasonable" solution. Id.

If reasonable prison officials could differ as to the decision, qualified immunity should be granted. The Fourth Circuit Court of Appeals noted its own inadequacy to address the factual situation presented to them in the case at bar. "We are not penologists ... [and] cannot properly judge the necessity or adequacy of appellants' actions." ***Mitchell v. Rice***, 954 F.2d at 193. Mitchell himself presented no testimony, expert or otherwise, that a less restrictive means was available, much less that restricting his exercise privilege was unreasonable. The Fourth Circuit Court of Appeals has elevated out-of-cell exercise to the level of a discrete constitutional right equal in majesty to the prohibition against corporal punishment. Even if the court were correct, surely it is a right that can be waived by conduct inimical to -- indeed, contemptuous of -- the exercise of that right. Mitchell's unrelenting assaultiveness in the face of graduated levels of restrictions clearly constitutes such a waiver. Surely these prison officials should not be subjected to the burden of a jury trial and potential liability when they decide to forbid totally out-of-cell exercise privileges to a prisoner who poses a constant danger of assault. Are prison officials constitutionally required to expose themselves to assault by a prisoner in order not to violate the prisoner's supposed constitutional right to exercise outside his cell? The Fourth Circuit Court of Appeals incorrectly applied the ***Anderson*** particularized standard of review in denying the defendant prison officials qualified immunity.

The Fourth Circuit Court of Appeals' decision in this case is also in direct conflict with a quite similar case in the Seventh Circuit, in which qualified immunity was granted. In ***Davenport v. DeRobertis***, 653 F. Supp. 649 (N.D. Ill. 1987), *modified and affirmed*, 844 F.2d 1310 (7th Cir. 1988), the Seventh Circuit Court of Appeals granted qualified immunity to prison officials

who allowed long term segregated inmates only one hour of out-of-cell exercise per week. The ***Davenport*** district court, further recognizing the occasional need for total denial of out-of-cell exercise to maintain security, held that total restriction was not objectionable "if a segregated inmate violates prison rules during his exercise or shower period...." 653 F. Supp. at 664. The Seventh Circuit Court of Appeals specifically approved this total restriction, noting that "[t]he exception for fractious inmates protects the defendants' legitimate interest in security, well illustrated by ***United States v. Fountain***, 768 F.2d 790 (7th Cir. 1985); it is unfortunate but unavoidable that the exception may itself engender litigation...." 844 F.2d at 1315.[7]

In the case at bar, Mitchell did violate prison rules -- by attempting to break a control station window to assault a guard -- while he was exercising by himself in the dayroom in full restraints. Mitchell, then, is that fractious inmate who engenders litigation. It would be impossible for any court to fashion a rule of law as to just what type of behavior is required to meet the "fractious inmate" standard. Prison officials must be able to employ their professional judgment in determining whether an inmate has reached that level.

Qualified immunity is a legal question. ***Mitchell v. Forsyth***, 472 U.S. 511 (1985). The record in the case at bar is sufficient, factually, to determine the legal correctness of the defendant prison officials' actions. Under very similar

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7 Even the Ninth Circuit Court of Appeals, in ***Spain v. Procunier,*** 600 F.2d 189, 199 (9th Cir. 1979), noted the possible need for a total deprivation of out-of-cell exercise when "disciplinary needs" required that decision.

circumstances, the Seventh Circuit Court of Appeals held that qualified immunity applied. It should apply here as well. The defendant prison officials urge this Court to grant their petition, review the record, and determine for itself that their actions entitle them to qualified immunity.

CONCLUSION

For the reasons stated, the petitioners believe that the decision of the Fourth Circuit Court of Appeals is in conflict with decisions of this Court and the Seventh Circuit Court of Appeals. Therefore, the Court should issue the writ in order to settle the conflicts and correct the decision below.

Respectfully submitted this the 25th day of June, 1992.

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

CIVIL NO. 86-235-CRT

FILED
Feb 19 1987

JAMES CALVIN MITCHELL,	)	
	)	
Plaintiff	)	
v.	)	
	)	AFFIDAVIT
GOVERNOR JAMES G. MARTIN, et al.,	)	
	)	
	)	
Defendants.	)	

I, NATHAN RICE, being first duly sworn, do hereby depose and say:

I am employed by the North Carolina Department of Correction, Division of Prisons, as Warden of Central Prison in Raleigh, North Carolina.

Inmate James Calvin Mitchell was admitted to the North Carolina Prison System on December 18, 1973 to serve a 30-year sentence for Second Degree Murder and a 5 to 10 year consecutive sentence for Armed Robbery. On April 23, 1975, he was convicted of Assault With A Deadly Weapon with Intent to Kill Resulting in Serious Injury for which he received a 3 year concurrent sentence. On November 10, 1975, he was convicted of Attempted Escape From Prison for which he received a 4 month concurrent sentence. On October 14, 1980, he was convicted of Assault with a Deadly Weapon Inflicting Serious Injury and received a 12-month concurrent sentence.

On July 11, 1983, while incarcerated at Central Prison, Inmate Mitchell assaulted two inmates, Harold Waddell, and Vernon Talbert in the dayroom. On September 20, 1984, he was convicted in Wake County Superior Court for these assaults. In Case No. 83-CRT-49597, he was convicted of Assault With a Deadly Weapon With Intent to Kill Inflicting Serious Injury. For this conviction, he was sentenced to 20 years in the custody of the Department of Correction with the sentence to begin at the expiration of all sentences. In Case No. 83-CRS-49596, he was convicted of Assault With A Deadly Weapon With Intent To Kill Inflicting Serious Injury. For this conviction, he received a sentence of 10 years in the custody of the Department of Correction with the sentence to begin at the expiration of all sentences which he was obligated to serve, and specifically, at the expiration of sentence imposed in Case No. 83-CRS-49597.

Inmate Mitchell has incurred 76 infractions of prison rules since his admission to prison. A copy of Inmate Mitchell's history card documenting the infractions is attached to this Affidavit, marked Exhibit A, and included as a part hereof. Inmate Mitchell was housed at Central Prison from January 5, 1982 through March 14, 1986 when he was transferred to Caledonia Correctional Institution. On one occasion, while Inmate Mitchell was out to court in Wake County, he took a weapon from an officer in the courthouse. Obviously, Inmate Mitchell has an extremely assaultive history and was a threat to staff and inmates while housed at Central Prison.

In July, 1983, Inmate Mitchell was assigned to maximum custody at Central Prison. The Division of Prisons, at that time, had four custody levels: minimum, medium, close and maximum. Maximum was the most stringent custody level in terms of security.

Inmate Mitchell was also assigned to Intensive Management. At that time, the purpose of intensive management was to isolate inmates that posed an imminent threat to the life or health of other inmates or staff of the unit or institution involved. (The Division of Prisons abolished the status of "intensive management" effective December 1, 1984.)

On July 11, 1983, Inmate Mitchell committed an assault on two inmates in he day room. A copy of the incident report documenting the assault is attached to this Affidavit, marked Exhibit B, and included as a part hereof. As a result of this assault, Inmate Mitchell was placed in restraints anytime he was to come out of his cell. On July 24, 1983, Inmate Mitchell, while in restraints in the dayroom on BC2A, picked up a broom and began beating on the control station window. A copy of an office memorandum documenting this incident is attached to this Affidavit, marked Exhibit C, and included as a part hereof. On July 25, 1983, Bobby R. Watson, Assistant Superintendent of Operations at Central Prison, made a request to Mr. R. B. Seymour, Program Director I in charge of classification, that Inmate Mitchell needed further restrictions placed on him in order to control his behavior. Subsequently, Inmate Mitchell's out of cell privileges were restricted to allow him only come out of his cell in order to take a shower each day. This action was approved by Mr. J. Dwight Sanderford, Assistant Director of Prisons, who was the final approving authority. The restrictions wefe reviewed in October, 1983. The final approving authority determined that the restrictions were still warranted based on Mitchell's behavior. The restrictions were lifted in February, 1984. However, as of February, 1984, Inmate Mitchell still presented an imminent threat to other inmates and staff. Therefore, he was retained in maximum custody, on intensive management status. Inmate Mitchell's custody and intensive management status were again reviewed on September 10, 1984. The final approving authority,

Gene T. Cousins, determined that Inmate Mitchell should be retained on intensive management in maximum custody.

On February 26, 1985, Inmate Mitchell was in the dayroom when he refused instructions by the officer to go back to his cell. Mitchell picked up a mop wringer and started beating on the window to the control station. Therefore, Associate Warden for Operations, Mr. Bobby R. Watson, again referred Inmate Mitchell to classification authorities and recommended that Inmate Mitchell not be allowed out of his cell except to shower each day. This recommendation was considered by the classification committee. The final approving authority, Gene T. Cousins, approved the recommendation. Therefore, Inmate James Mitchell was only allowed outside of his cell once a day to shower. Subsequently, Inmate Mitchell's classification status was reviewed in October, 1985, and March, 1986. Inmate Mitchell was transferred to Caledonia on March 14, 1986.

In his complaint Inmate Mitchell alleges that he was harassed by prison officials. I absolutely deny this allegation. I have never harassed Inmate Mitchell nor have I discriminated against him. The restrictions that were placed on Inmate Mitchell while he was incarcerated at Central Prison were only a consequence of his own violent and assaultive behavior. When his own behavior showed improvement, some of the restrictions placed on Inmate Mitchell were lifted. This is shown by the classification action in February, 1984, when his outdoor exercise period and ability to use the law library were returned to him. Again, in 1985, he threatened the officer in the control station with a mop wringer by beating it against the window. Again restrictions were necessary to control his violent behavior. As Warden of Central Prison, it is my responsibility to protect the safety of the lives of inmates and staff assigned to this prison. Inmate Mitchell, for periods of time, was restricted to his cell except to shower. This action was justified in order to protect inmates and staff from

further assaults by Inmate Mitchell. Inmate Mitchell was showered in full restraints. This was necessitated by his own history of assaultive behavior.

During the periods of time that Inmate Mitchell was restricted from going to the law library, he was allowed to request law library materials and have them provided to him in his cell.

In conclusion, I deny that I have ever acted in a manner intended to deprive this inmate of any rights secured to him by the Constitution of the United States or federal law.

This the __1__ day of July, 1986.

/s/NATHAN A. RICE
Affiant

Sworn to and subscribed before me
this the 1 day of July, 1986.

/s/ Michael J. Lamm
Notary Public

My Commission Expires: April 13, 1991

EXHIBIT A
4690-383-21157-OS JAMES CALVIN MITCHELL TYPE/CUST: MAX
ALIAS: ADM DATE: 12/18/73
ADR: 400 SYLVANIA AVE CURR LOC: CALEDONIA 3305 SEG: A/S
CHARLOTTE 28206 ADMT LOC: POLK 3925
RACE: BLACK
SEX: MALE FPC: 18PM101515DI17151516TYPE REL:
DOB: 11/01/57 FBI: 0038364M4 LST VIO: 05/09/86PROJ REL: 104/30-13
POB:
OUT OF STAT PRIOR CONV: 00 TOT VIO: 076COUTY REL: MECK 60
RES: MECKLEN
BURG SBI: ESC/ABS: 09/05-75ANALYST: KARASOW
HGT: 5'7" OLN: TOT ESC: 001 L/3 SPEC: 00/00/00
WGT: 140 OLS: TOT DET: 000 PAR ELIG: 09/18/79
HAIR: BLACK MAR: MARRIED STUDY R:PAR REFER: 01/08/87
EYES: BROWN OCC: STUDENT WORK R:COMP TYPE:
SMT: EDUC: 09 GAIN TM: COMP ST:
SOC: 238-04-9750 GOOD TIME LOST CURR.SENT: 01060TCMNSL: 35-00-00
TOT RELATIVE: ELEANOR MITCHELL MOTHER TCMXSL: 70-00-00
SENT 07 ADDRESS: COMSER P: 00/00/00D

CURR CRIME: CONV CNTY F BEGIN SENT SENT REL REL JAIL SENT
SENT DATE CONV M DATE MIN MAX MIN MAX CRED TYPE
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SEGRE-
GATION 031486 3305 A/S OFF 00000
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RULE VIOL 021677 3925 MED 030 DAYS MAJ 38 PROFANE LANG/GESTURE/ACT
RULE VIOL 021577 3925 MED 000 DAYS MIN 39 DISOBEY PRISON OFFICIAL
RULE VIOL 010177 3925 MED 000 DAYS MIN 39 DISOBEY PRISON OFFICIAL
RULE VIOL 121276 3925 MED 030 DAYS MAJ 38 PROFANE LANG/GESTURE/ACT
RULE VIOL 082476 3805 MED 000 DAYS MIN 39 DISOBEY PRISON OFFICIAL
GAIN TIME 071576 TRANSFERRED
RULE VIOL 061676 3805 MED 000 DAYS MIN 26 ASSAULT
RULE VIOL 060876 3805 MED 000 DAYS MIN 39 DISOBEY PRISON OFFICIAL
PF 4-MENU W/DOC 5-MENU 6-BASE 7-NEXT SENT 9-MAPP 10-MASTER 11-NAME ENTER-CONT.

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SENTENCE SCREEN-ACTIVE FILE  06/06/86      09:54:49
4690-383-21157-OS JAMES CALVIN   MITCHELL 3305  CALE  MAX  SENT 01 OF 07
CMTD:  MURDER SECOND DEGREE   F MECK SUPER 00CR000000 JUDGE:  NOT
REPORTED
JAIL:  GAIN:  EXP OF:  CONC W:  HOLD: 02 SQ:  02 S  MAX: 00-00
ADM:  12/18/73  BEG: 12/17/73  MIN: 30-00-00  EX MIN: 04/30/93
CONV: 12/17/73  REL: 104/30/13 MAX: 00-00-00 EX MAX: 00/00/00 REST: 00000
GAIN TIME  052576                              RATE 2
RULE VIOL  030676 3805 MED 000 DAYS        MAJ 38 PROFANE LANG/GESTURE/ACT
RULE VIOL  090575 3905 MED 000 SUSP        MAJ 24 ESCAPING
CAPTURE    090575 3905
ESCAPE     090575 3905  MED
RULE VIOL  020375 3905 MED 000 DAYS        MAJ 26 ASSAULT
RULE VIOL  092174 3905 MED 000 SUSP        MAJ 38 PROFANE LANG/GESTURE/ACT
RULE VIOL  091574 3905 MED 000 DAYS        MAJ 26 ASSAULT
RULE VIOL  082074 3905 MED 000 DAYS        MAJ 38 PROFANE LANG/GESTURE/ACT
RULE VIOL  070974 3905 MED 000 DAYS        MAJ 38 PROFANE LANG/GESTURE/ACT
RULE VIOL  020774 3905 MED 000 DAYS        MAJ 26 ASSAULT
CERTIFI-
 CATION    012574        CANC US MARSHALL                ASHEVILLE NC
RULE VIOL  011474 3905 MED 000 DAYS        MAJ 38 PROFANE LANG/GESTURE/ACT
RULE VIOL  010874 3905 MED 000 SUSP        MAJ 39 DISOBEY PRISON OFFICIAL
JAIL CREDIT 121773  158 DAYS
PF 4-MENU W/DOC 5-MENU 6-BASE 7-NEXT SENT 9-MAPP 10-MASTER 11-NAME ENTER-
CONT.
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SENTENCE SCREEN-ACTIVE FILE  06/06/86      09:54:49
4690-383-21157-OS JAMES CALVIN   MITCHELL 3305  CALE  MAX  SENT 01 OF 07
CMTD:  MURDER SECOND DEGREE   F MECK SUPER 00CR000000 JUDGE:  NOT
REPORTED
JAIL:  GAIN:  EXP OF:  CONC W:  HOLD: 02 SQ:  02 S  MAX: 00-00
ADM:  1 2/18/73  BEG: 12/17/73  MIN: 30-00-00  EX MIN: 04/30/93
CONV: 12/17/73  REL: 104/30/13 MAX: 00-00-00 EX MAX: 00/00/00 REST: 00000
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SENTENCE SCREEN-ACTIVE FILE  06/06/86      09:54:49
4690-383-21157-OS JAMES CALVIN   MITCHELL 3305  CALE  MAX  SENT 01 OF 07
CMTD:  MURDER SECOND DEGREE   F MECK SUPER 00CR000000 JUDGE:  NOT
REPORTED
JAIL:  GAIN:  EXP OF:  CONC W:  HOLD: 02 SQ:  02 S  MAX: 00-00
 ADM:  12/18/73  BEG: 12/17/73  MIN: 30-00-00  EX MIN: 04/30/93
CONV: 12/17/73  REL: 104/30/13 MAX: 00-00-00 EX MAX: 00/00/00 REST: 00000
PF 4-MENU W/DOC 5-MENU 6-BASE 7-NEXT SENT 9-MAPP 10-MASTER 11-NAME ENTER-
CONT.
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SENTENCE SCREEN - ACTIVE FILE 06/06/86 09:54:49
4690-383-21157-OS JAMES CALVIN MITCHELL 3305 CALE MAX SENT 03 OF 07
ASSAULTS F MBCK SUPER 00CR0000 00 JUDGE: NOT REPORTED
JAIL: GAIN: EXP OP: CONC W: HOLD: 02 SQ: 04 S MAX: 00-00
ADM: 12/18/73 BEG: 00/00/00 MIN: 03-00-00 EX MIN: 00/00/00
CONV: 04/23/75 REL: 104/30/13 MAX: 00-00-00 EX MAX: 00/00/00 REST: 00000

SENTENCE SCREEN - ACTIVE FILE 06/06/86 09:54:49
4690-383-21157-OS JAMES CALVIN MITCHELL 3305 CALE MAX SENT 04 OF 07
ESCAPE PRISON F MBCK SUPER 00CR000000 JUDGE: NOT REPORTED
JAIL: GAIN: EXP OP: CONC W: HOLD: SQ: 05 S MAX: 00-00
ADM: 12/18/73 BEG: 00/00/00 MIN: 00-04-00 EX MIN: 00/00/00
CONV: 11/10/75 REL: 104/30/13 MAX: 00-00-00 EX MAX: 00/00/00 REST: 00000

PF 4-MENU W/DOC 5-MENU 6-BASE 7-NEXT SENT 9-MAPP 10-MASTER 11-NAME ENTER-CONT.

SENTENCE SCREEN - ACTIVE FILE 06/06/86 09:54:49
4690-383-21157-OS JAMES CALVIN MITCHELL 3305 CALE MAX SENT 05 OF 07
AWDWISI F CASH SUPER 80CR001262 JUDGE: CHARLES T. KIVETT
JAIL: 000 GAIN: EXP OP: 01 CONC W: 02 HOLD: SQ: 06 SMAX: 00-00
ADM: 12/18/73 BEG: 00/00/00 MIN: 00-00-00 EX MIN: 00/00/00
CONV: 10/14/80 REL: 104/30/13 MAX: 00-12-00 EX MAX: 00/00/00 REST: 00000

PF 4-MENU W/DOC 5-MENU 6-BASE 7-NEXT SENT 9-MAPP 10-MASTER 11-NAME ENTER-CONT.

SENTENCE SCREEN - ACTIVE FILE 06/06/86 09:54:49
4690-383-21157-OS JAMES CALVIN MITCHELL 3305 CALE MAX SENT 06 OF 07
AWDWWITKISI F WAKE SUPER 83CR049 7 JUDGE: H V BARNETT
JAIL: 000 GAIN: EXP OF: 02 CONC W: HOLD: 07 SQ: 07 SMAX: 00-00 FR-F
ADM: 09/20/84 BEG: 104/30/98 MIN: 00-00-00 EX MIN: 00/00/00
CONV: 09/20/84 REL: 104/30/13 *MAX: 20-00-00 EX MAX: 104/30/03 REST: 00000
COMMENT 082685 NO ERROR BY CRT OF APPEALS

PF 4-MENU W/DOC 5-MENU 6-BASE 7-NEXT SENT 9-MAPP 10-MASTER 11-NAME ENTER-CONT.

SENTENCE SCREEN - ACTIVE FILE 06/06/86 09:54:49
4690-383-21157-OS JAMES CALVIN MITCHELL 3305 CALE MAX SENT 07 OF 07
AWDWISI F WAKE SUPER 83CR049596 JUDGE: H V BARNETT
JAIL: 000 GAIN: EXP OF: 06 CONC W: HOLD: SQ: SMAX: 00-00 FR-H
ADM: 12/18/73 BEG: 104/30/08 MIN: 00-00-00 EX MIN: 00/00/00
CONV: 09/20/84 REL: 104/30/13 *MAX: 10-00-00 EX MAX: 104/30/13 REST: 00000
COMMENT 082685 NO ERROR BY CRT OF APPEALS
TRANSFER 031486 3100 MAX TO 3305
TRANSFER 010582 3940 CLOSE TO 3100
TRANSFER 062581 3305 CLOSE TO 3940
TRANSFER 030481 3100 MAX TO 3305
TRANSFER 073080 3940 CLOSE TO 3100
TRANSFER 051380 3100 CLOSE TO 3940
TRANSFER 043080 3940 CLOSE TO 3100
TRANSFER 031980 3310 CLOSE TO 3940
TRANSFER 042777 3925 MED TO 3310
TRANSFER 120776 3805 MED TO 3925
TRANSFER 120376 3925 MED TO 3805
TRANSFER 102876 3805 MED TO 3925
TRANSFER 072276 3100 MED TO 3805
TRANSFER 071576 3805 MED TO 3100
PF 4-MENU W/DOC 5-MENU 6-BASE 7-NEXT SENT 9-MAPP 10-MASTER 11-NAME ENTER-CONT.

SENTENCE SCREEN - ACTIVE FILE 06/06/86 09:54:49
4690-383-21157-OS JAMES CALVIN MITCHELL 3305 CALE MAX SENT 07 OF 07
AWDWISI F WAKE SUPER 83CR049596 JUDGE: H V BARNETT
JAIL: 000 GAIN: EXP OF: 06 CONC W: HOLD: SQ: SMAX: 00-00 FR-H
ADM: 12/18/73 BEG: 104/30/08 MIN: 00-00-00 EX MIN: 00/00/00
CONV: 09/20/84 REL: 104/30/13 *MAX: 10-00-00 EX MAX: 104/30/13 REST: 00000
TRANSFER 012276 3905 MED TO 3805
TRANSFER 080875 3805 MED TO 3905
TRANSFER 122074 4530 MED TO 3905
TRANSFER 121274 3905 MED TO 4530
TRANSFER 122873 3925 MED TO 3905

EXHIBIT B

OFFICE MEMORANDUM

TO: G.E. Currie, Captain DATE: July 13, 1983

FROM: /s/ R.G. West, Lieutenant

RE: Incident Report Assault of Inmates
Harold Waddell 10163-41
Vernon Talbert 10753-0S

On July 11, 1983 at approximately 10:15 a.m., while the lower level of 2A Westside was having dayroom privileges, Officer Jernigan who was working BC2A observed Inmates Willie Granford, 20952-80 and James Mitchell 21157-0S assaulting Inmates Vernon Talbert 10753-0S and also Harold Waddell 10163-41 with homemade weapons (shanks). He immediately used his intercom and advised OC3 that he had a fight in the dayroom and to send some help in a hurry because the Inmates had weapons.

Sgt. Richardson who was working OC3 immediately called me in the Lieutenant's Office and also stopped Officer Brooks and Boyd who were enroute to the hospital with an IM Inmate and told them to report to 2A. Officer Brooks left Officer Boyd with the Inmate and ran down the hall toward 2A, slowing down at the Sergeants Office long enough to get Sgt. Alford. I immediately called Captain Currie's Office, Lt. J. V. Fogg answered the phone and I instructed him to send all available help from the east side to 2A, that a fight was in progress. I then ran to 2A dayroom, Sgt. Alford, Officers Brooks and Douglas were already at the scene. All Inmates were in their cells when I arrived with the exception of the victims. Inmate Waddell was lying against door 89 (inside sallyport door on 2A Westside) causing it to jam, so we had to

use the eastside entrance and go through the lower level emergency exit door to get to the scene.

I immediately went to the victims and observed both bleeding profusely, I instructed Officers Jernigan and Cole (Mr. Cole was working 1A and came upstairs to help) to get medical aid and some stretchers. Officer Cole stated he had already called the First Aid Room and that nurses were on their way. Nurses Morgan and Baker arrived shortly and were able to enter from the Westside, Inmate Waddell had moved some and door 89 would open without difficulty. They rendered first aid until the stretchers arrived, then they accompanied the victims to the Acute Hospital, where they were treated and admitted to the Intensive Care Unit.

I then instructed Sgt. Hill and Sgt. Alford to use the Officers that were on the scene to search all inmates and cells on the Westside on 2A. A total of four (4) homemade weapons were found, they are being kept by Sgt. Alford as evidence. The weapons were found in the following Inmates Cells: 1. Willie Granford 20952-80 AL-201, 2. James Mitchell 21157-OS AL-207, 3. Demorris Carter 20054-33 AU-207, 4. Claudie Carter 20451-25 AL-205. I then began my investigation, there were five (5) inmates in the dayroom when the assault occurred. They were the victims, the assailants and Josh Matthews (he did not participate). Two (2) other Inmates are housed on the lower level but are currently on cell lock-up. They are Kenneth Cherry and Claudie Carter.
Pictures were taken of the dayroom area, they will be attached. I was unable to get pictures of the victims due to the emergency medical attention needed to stop their loss of blood.

I talked privately with every Inmate housed on the Westside of 2A, Upper and Lower levels. Everyone seemed to think this was something planned by the assailant and it seems they kept it quiet, because no one knew about it. It appears there had been no argument, or negative feeling between the assailants and the victims. On July 12, 1983 I questioned the victims in the ICU, Inmate Waddell was very sarcastic and disrespectful, Inmate Talbert (has only been at CP about a week) stated he didn't even know the assailants, and could offer no explanation for the assault. I then questioned some Inmates on B-Block who had recently moved from A Block, they could offer nothing of benefit.

Next I got written statements from all staff involved. Officer Jernigan who was working in BC2A stated the first thing he saw was inmate Willie Granford attack Harold Waddell with a long shiny object. As he was using his intercom to contact Sgt. Richardson to send help he observed James Mitchell attack Vernon Talbert with a shorter weapon. Officer Cole who was working 1A heard Officer Jernigan calling for help and came upstairs to help and he called FAR for medical help. Both Officer observed the assault and observed Inmate Granford beating the victims about the head with a mop bucket. The Officers state that they pounded on the glass to get the Inmates attention and gave them several direct orders to stop fighting. Officer Jernigan observed Officer Douglas standing in the hallway near the Chaplains Office (he was escorting some Death Row Inmates) and yelled to him that he had a fight to get some help. He went to the Westside of 2A and observed both assailants striking both victims. He started after some help but saw Sgt. Alford and Officer Brooks coming. When Sgt. Alford and Officer Brooks reached the westside of 2A, the outside door (88) to the sallyport was open, but the inside door (89) would not open, Inmate Waddell was lying against it and had it jammed, they observed Inmate Granford and Mitchell stab the victims several times. Realizing that door 89 would not open they went through the eastside and used the lower level emergency door to gain entrance to the Westside dayroom, When they arrived the assailants had stopped their attack and were going into their cells.

While talking to the Inmates I got several conflicting bit and pieces of information

(1) Both of the Victims are white, it seems that Inmate Waddell stabbed a Black Inmate recently while at Blanch Prison by the name of Gus George, and Talbert stabbed an Inmate Dennis Oaks very recently while assigned to Avery County. This is their reason for being in Maximum Custody, on Intensive Management and assigned to Central Prison.

(2) It seems Inmate Granford has a clique going with several other black Inmates housed on the Westside of 2A and he is quiet disturbed because there are no homosexuals on this block. He has written grievances complaining of this. He had directed sexual slurs toward Inmate Waddell in the past but the best I can determine no one including Waddell had taken him serious.

Both assailants will be charged Administratively with violations of articles 18, 26 and 39, they are currently on Administrative Segregation pending a hearing by Unit Supt.

I have read the Miranda Warning to each assailant and explained their rights, they both acknowledged that they fully understood. They declined to make any statement at this time.

I recommend that both assailants be kept in full mechanical restraints anytime they are out of their cells. My reasoning for this is that I fully think this assault would have been fatal had their weapons and timing been better.

If additional information is needed please advise.

Attachments
Pictures (6)
Hospital Emergency Room Report (2)
Statements of Witnesses

OK
/s/ illegible
7-14-83

EXHIBIT C

OFFICE MEMORANDUM

TO: Capt. H.M. Godfrey DATE: 7-24-83

FROM: /s/ Lt. E.E. Hodge

RE: Inmate James C. Mitchell M4690-383-21157-0S
OFFENSE REPORT

My investigation revealed on 7-24-83, around 6:40 p.m., Officer Grant, who was assigned to BC2A, observed Inmate James C. Mitchell, who was in the East side dayroom in full restraints, come up to the BC Station. Mitchell began to question Officer Grant on the provisions of a memorandum set forth by Supt. Watson that states the food passage doors on the doors of Disciplinary lock-up inmates will remain closed unless in use. Officer Grant explained to Mitchell he was observing the memorandum, whereas he didn't want to argue with Mitchell over it. Mitchell became unruly and wanted to argue some more, but Officer Grant walked away from the front of the Station.

Inmate Mitchell, seeing Officer Grant had walked away from him, yelled for Officer Grant to return to the front of the Station so he could talk to him. When Officer Grant refused, Mitchell picked up a broom that was in the day room and began banging on the Lexan glass with the broom handle, stating he wanted to see the Sgt. Officer Grant immediately told him to stop beating on the glass whereas Mitchell told Grant he didn't want to hear that shit and continued to bang on the glass with the broom. Mitchell became persistent and continued to bang on the glass. Officer Grant at this time

called the Sgt. by phone to explain the problem he was having. Mitchell seeing Officer Grant on the phone, stopped banging on the glass.

I questioned Inmate Mitchell about the incident. Mitchell eventually admitted to me that he did in fact bang on the glass with the broom but it was only after the Officer had turned his back on him. I carefully explained to Mitchell the proper avenue to take to air a complaint.

I chose to advise Mitchell of his rights and inform him I was charging him with Section 39. Mitchell refused to sign, make, or have anyone else submit a statement in his behalf. Mitchell was told that he would remain as is, disciplinary lock-up, pending a Supt. hearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 86-235-CRT

FILED
Jul 20 1987

JAMES CALVIN MITCHELL Plaintiff v. GOV. JAMES MARTIN, NATHAN RICE, BOBBY WATSON, BOB SEYMOUR Defendants	)	MEMORANDUM and RECOMMENDATION

Plaintiff, a state court prisoner in the custody of the North Carolina Department of Correction and housed at the time of the matters in question at Central Prison in Raleigh, has brought this civil rights action pursuant to 42 U.S.C. § 1983, in which he alleges violations of his constitutional rights. Specifically, the plaintiff contends that:

(a) He has been deprived of an opportunity to have a proper shower because prison officials put him in full restraints;

(b) He has been denied any kind of recreational activities outside his cell and, furthermore, that he has been denied daily sunshine and fresh, outside air;

(c) He has been denied permission to clean his prison cell daily with needed equipment such as broom, mop, etc.;

(d) He has been denied the use of the Central Prison law library for reasons unjustified, which denies him access to the courts;

(e) He has been exposed to cruel and unusual punishment and inhumane and sadistic treatment without reasonable justification;

(f) He has been denied due process because he was placed in intensive management lockup by an inter-prison committee, and his only counsel was a staff member of the prison system. Therefore, he was denied effective counsel and denied due process.

(g) Prison officials have demonstrated unjust discrimination by not responding to his requests;

(h) He did not assault or threaten staff or inmates but, rather, he damaged state property when he took a mop wringer and hit the plexiglas window of a guard station several times, making a few scratches and leaving the mop wringer bent;

(i) His letters to institution heads have been met with replies of pure disrespect and mockery; and

(j) He is being discriminated against mentally, physically, arbitrarily, capriciously, and illicitly.

Plaintiff seeks $175,000 in damages for the alleged violations of his rights guaranteed by the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

The defendants seek dismissal of Governor Martin as a defendant and a judgment as a matter of law and a dismissal of the action, alleging that the plaintiff has failed to state any grounds upon which relief can be granted. These motions are now ready for ruling.

A. Mootness

The defendants contend that allegations in the complaint are moot. Since the prisoner was moved to Caledonia Correctional Institution on May 14, 1986, there no longer exists an outstanding case or controversy between the plaintiff and the defendants for which injunctive or declaratory relief is appropriate. See *Inmates v. Sheriff Owens*, 561 F.2d 560 (4th Cir. 1977). However, his claim for damages would not be moot.

B. Dismissal of Governor Martin as a Defendant

The defendants contend that the doctrine of respondeat superior does not apply in civil rights actions in the absence of some sort of personal involvement in the deprivation of constitutional rights. A defendant may not be held liable on the theory of implied liability. Liability attaches if conduct directly causing deprivation is done to effectuate official policy or custom for which the official is responsible. *Vinnedge v. Gibbs*, 550 F.2d 946 (4th Cir. 1977). Governor Martin had no personal involvement in inmate Mitchell's case and cannot be held liable simply because of his position as Governor of North Carolina. The defendants' motion to dismiss Governor Martin as a defendant should be ALLOWED.

C. Conditions of Confinement

Plaintiff Mitchell contends that the restrictions placed upon his ability to exercise, shower and clean his cell daily have amounted to cruel and unusual punishment. The defendants argue that inmate Mitchell must be in full restraint in maximum security because he assaulted two other inmates in 1983 during his incarceration at Central Prison (see Affidavits of Warden Nathan Rice and Bobby Watson), where he was serving a 30-year sentence for second-degree murder and concurrent sentences for armed robbery, assault with a deadly weapon inflicting serious injury, and attempted escape from prison. He received an additional 30 years to begin at the expiration of all other sentences. Inmate Mitchell also incurred 76 infractions of prison rules since his admission to prison, demonstrating extremely assaultive history, and he was a threat to staff and inmates while housed at Central Prison (January 5, 1982, through March 14, 1986).

Prison administrators have a responsibility to protect inmates from assaults by other inmates. See *Withers v. Levine*, 651 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980). Central Prison officials had a duty to protect other inmates and staff from inmate Mitchell's assaultive behavior and, therefore, extreme restraint was necessary because of his behavioral history. Prison officials would have been remiss in their duties had they acted otherwise. Warden Rice also denied in his affidavit that the inmate had been harassed at any time.

Prison officials must also balance their responsibilities to provide prison inmates adequate opportunities to shower, exercise, and clean their cells with their duty to provide other inmates with a safe living environment. See *Sweet v. South Carolina Department of Corrections*, 529 F.2d 584 (4th Cir. 1975). Unless the prisoner is confined in a manner which is

"physically barbarous," the proscriptions of the Eighth Amendment have not been violated. ***Estelle v. Gamble,*** 429 U.S. 97, 5 L.Ed.2d 251, 97 S. Ct. 285 (1976). "Conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional." To the extent that such conditions are restrictive and even harsh, they are part of the penalty criminal offenders pay for their offenses against society. ***Rhodes v. Chapman***, 452 U.S. 337, 347, 69 L.Ed.2d 59, 69, 101 S. Ct. 2392 (1981).

Prisoner Mitchell's past disruptive and dangerous behavior provides ample justification for the restrictions placed upon him. (See Affidavit of Warden Rice.) To allow him cleaning items for his cell might have given him more opportunity to use them upon others. He cannot object to his conditions simply because he was not satisfied with them. He was given adequate opportunities to attend to his health and hygiene needs, given his violent tendencies. See *Clay v. Miller*, 626 F.2d 345 (4th Cir. 1980). Therefore, his requested claim for relief should be DENIED.

D. **Due Process Considerations**

The plaintiff claims he was denied due process because he was placed in intensive management lockup by an inter-prison committee. Statements of prison officials (see Affidavits of R. B. Seymour and Bobby Watson) indicate that these changes in classification were a direct result of his disruptive behavior and assaults on others, and they were made by proper procedures in use at the time by the Division of Prisons. Inmate Mitchell was given notice and a proper hearing as to these changes in his classification. When administrative segregation is at issue, due process merely requires that the inmate receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer

him to administrative segregation. ***Hewitt v. Helms***, 459 U.S. 460 (1983).

E. **Denial of Access to the Courts**

Plaintiff contends that he has been denied access to the courts He alleges that he was unjustifiably restricted from the prison law library. States have a constitutional duty to provide reasonable access to the courts. ***Bounds v. Smith***, 430 U.S 817, 52 L.Ed.2d 72, 97 S. Ct. 1491 (1971). North Carolina provides prisoner law libraries to satisfy this requirement, but prison officials may make reasonable restrictions as to the operation of these libraries. Again, prison order and the safety of other prisoners is paramount. See ***Williams v. Leek***, 584 F.2d 1336 (4th Cir. 1978).

Prisoner Mitchell was a maximum security prisoner who had attacked two other prisoners, grabbed a gun, although unloaded, from a guard, and struck a prison guard booth. Prison records and affidavits amply demonstrate the necessity of limiting the prisoner to the use of legal materials in his cell. This reasonable security measure did not deny him access to the courts. Therefore, the plaintiff failed to show that he was denied due process or that he has been injured by the security restrictions on his on-site use of the prison library. The plaintiff was provided use of legal materials, but his maximum security status necessitated restricted access. See ***Hatfield v. Bailleaux***, 290 F.2d 632 (9th Cir. 1961).

E. **Allegations of Discrimination**

Furthermore, the plaintiff's allegations of discrimination are conclusory and should be DISMISSED. See ***White v. Boyle***, 538 F.2d 1077 (4th Cir. 1976).

CONCLUSION

For the foregoing reasons, the plaintiff has failed to state any valid grounds upon which relief can be granted. Therefore, the defendants' motion for summary judgment should be ALLOWED.

THIS MEMORANDUM AND RECOMMENDATION ENTERED this the 17th day of July, 1987.

/s/Charles K. McCotter, Jr.
CHARLES K. McCOTTER, JR.
United States Magistrate

I certify the foregoing to be a true
and correct copy of the original.
J. Rich Leonard, Clerk
United States District Court
Eastern District of North Carolina

By /s/ Lorita K. Pinnix
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

FILED
Aug 12 1987

NO. 86-235-CRT

JAMES CALVIN MITCHELL, Plaintiff,	)	
v.	)	ORDER
GOVERNOR JAMES MARTIN, et al., Defendants.	)	

On 20 July 1987 Magistrate Charles K. McCotter, Jr., filed his memorandum and recommendation with regard to the motion by defendants to dismiss or, in the alternative, for summary judgment. In apt time plaintiff filed objections, and the matter is now before the court for decision.

Upon review the court is convinced that the recommendation of Magistrate McCotter is, in all respects, in accordance with law. Therefore, the objections of plaintiff to the recommendation are overruled, the court adopts the recommendation of Magistrate McCotter as its own, and for the reasons set forth in his memorandum the motion by defendants for summary judgment is allowed and this action is hereby dismissed.

This 12 day of August, 1987.

/s/W. Earl Britt
W. EARL BRITT
United States District Judge

I certify the foregoing to be a true and correct copy of the original.
J. Rich Leonard, Clerk
United States District Court
Eastern District of North Carolina

By: /s/ (illegible)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

JAMES CALVIN MITCHELL,
Plaintiff

v.

GOV. JAMES MARTIN, NATHAN RICE, BOBBY WATSON, BOB SEYMORE,
Defendants

JUDGMENT IN A CIVIL CASE

Case Number: 86-235-CRT

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its decision.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that the court adopts the recommendation of the magistrate, the defendants' motion for summary judgment is allowed and this action is DISMISSED.

THE ABOVE JUDGMENT WAS ENTERED THIS DAY, August 12, 1987 AND A COPY MAILED TO:

James Calvin Mitchell
Central Prison
1300 Western Blvd.
Raleigh, NC 27606

Mr. Lucien Capone, III
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602-0629

AUGUST 12, 1987
Date

J. RICH LEONARD
Clerk

/s/ Steven B. Wade
(By) Deputy Clerk Steven B. Wade

(UNPUBLISHED)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-6592

JAMES CALVIN MITCHELL

Plaintiff-Appellant

v.

JAMES MARTIN, Governor; NATHAN RICE; BOBBY WATSON; BOB SEYMORE

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Chief District Judge. (C/A No. 86-235-CRT)

Submitted: October 30, 1987 Decided: December 17, 1987

Before RUSSELL, PHILLIPS, AND CHAPMAN, Circuit Judges.

(James Calvin Mitchell, Appellant Pro Se. Lucien Capone, III, Assistant Attorney General, for Appellees.)

PER CURIAM:

James Calvin Mitchell, a North Carolina inmate, appeals the dismissal of his 42 U.S.C. § 1983 action. He brought this suit for damages against the Central Prison warden, the superintendent of operations, the chairman of the ICC board, and the Governor of North Carolina. He alleged that his fourteenth and eighth amendment rights were violated because:

(1) prison officials tried to provoke him to justify their mental and physical abuse of him;

(2) he was forced to shower in full restraints;

(3) he was denied all recreational activities and exercise outside of his cell including daily sunshine and fresh air for extended periods;

(4) he was not allowed to clean his cell daily;

(5) he was restricted in his use of the law library;

(6) when he was disciplined, the only due process he was afforded was the assistance of a staff member to help him when he met with the disciplinary committee; however, he was allowed no witnesses;

(7) he was put in restraints in violation of the rules because he was disciplined for an incident which only involved damaged property; and

(8) his punishment was unusually severe and as such violated the equal protection clause.

The respondents submitted extensive evidence regarding Mitchell's history of assaultive behavior while in prison. A magistrate carefully reviewed all of Mitchell's claims and recommended granting summary judgment for the defendants. After considering Mitchell's objections to the magistrate's report, the district court reviewed the record de novo and adopted the magistrate's report and recommendation. On appeal Mitchell requests a temporary restraining order against the defendants for allegedly harassing him although he states he is no longer in restraints.

We have thoroughly reviewed the record, and we find that the district court's decision based on the magistrate's recommendation is correct on all points with the exception of Mitchell's claims that he was denied all exercise and outside activities for three extended periods, one of which exceeded a year. Therefore, this case shall be affirmed in part and vacated in part. Regarding his claim for denial of exercise, Mitchell alleged the following.

In July of 1983, after seriously assaulting two inmates and subsequently beating on a guard booth with a broom, Mitchell's out-of-cell privileges were restricted to allow him only to come out of his cell to take a shower each day. Before leaving his cell to shower, he was placed in full restraints. Full restraints included handcuffs, a waistchain, and leg cuffs. After seven months, these out-of-cell restrictions were lifted. One year later, Mitchell again beat on a guard booth with a mop, and, as a result, he was only allowed out of his cell to shower each day. Whenever he came out of his cell to shower, he was placed in full restraints. As a result, Mitchell was allowed no exercise or outdoor activity for a period of thirteen months, after which he was transferred to Caledonia Prison Mitchell was transferred back to Central Prison in December of 1986, and was involved in a serious altercation with a guard in February of 1987. His out-of-cell privileges were

again restricted to allow him to come out of his cell only to take a shower each day. Before being allowed to shower, Mitchell was placed in full restraints. It is not clear from the record how long the restrictions which were placed on Mitchell in February of 1987 were maintained.

Summary judgment for the defendants on this claim was inappropriate. ***Patterson v. Mintzes***, 717 F.2d 284, 289 (6th Cir. 1983)(summary judgment for defendant was improper where plaintiff alleged 46-day denial of out-of-cell exercise); ***Kirby v. Blackledge***, 530 F.2d 583, 584-87 (4th Cir. 1976)(summary judgment for defendant premature because inadequate exercise taken alone can reach level of cruel and unusual punishment). Although the prison had legitimate concerns about Mitchell's assaultive history, these concerns cannot justify a complete denial of exercise for over a year. The courts have reviewed the rights of inmates at least as dangerous as Mitchell and have held that they retain a right to exercise. **See, e.g.**, ***Spain v. Procunier***, 600 F.2d 189, 199 (9th Cir. 1979)(most dangerous men of prison, each of whom had been convicted of or charged with violent acts while in prison even before being responsible for crimes in which three prison guards and two inmates were killed, would be entitled to fresh air and regular outdoor exercise).

We have held that conditions of administrative segregation will meet constitutional standards if inmates are provided regular times to exercise. ***Shrader v. White***, 761 F.2d 975, 981 (4th Cir. 1985). Moreover, in ***Sweet v. South Carolina Dep't of Corrections***, 529 F.2d 854, 865-66 (4th Cir. 1975), we remanded the case for a determination of whether two exercise periods a week met constitutional standards. Finally, under the circumstances of the instant case, where an inmate was denied all exercise for over a year, we do not think that our holding in ***Clay v. Miller***, 626 F.2d 345, 347 (4th Cir. 1980), can be construed to

mean that Mitchell must first sustain an injury from this denial before he has a valid constitutional claim.

Therefore, we vacate the entry of summary judgment on Mitchell's claim regarding the denial of exercise and outdoor activity and remand the case to the district court for further review of that claim. In all other respects, the district court's judgment based on the magistrate's recommendation is affirmed. As Mitchell is no longer in restraints and makes only vague and conclusory allegations of harassment, we deny his motion for a temporary restraining order. Because the dispositive issues have recently been decided authoritatively, we dispense with oral argument.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-6592

Filed
Jan 19 1988

James Calvin Mitchell,

Plaintiff - Appellant,

v.

James Martin, etc., et al.,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge.

Upon consideration of the appellees' motion for an extension of time until January 14, 1988 in which to file their petition for rehearing.

IT IS ORDERED that the motion is granted.

For the Court

JOHN M. GREACEN
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-6592

FILED
Feb. 29 1988

James Calvin Mitchell

Plaintiff-Appellant,

v.

James Martin, Governor; Nathan Rice; Bobby Watson; Bob Seymore,

Defendants-Appellees.

On Petition for Rehearing

Upon consideration of the appellees' petition for rehearing,

IT IS ORDERED that the petition for rehearing is granted and this case is set down for formal briefing and oral argument.

Entered at the direction of Judge Chapman, with the concurrence of Judge Russell and Judge Phillips.

For the Court

JOHN M. GREACEN
CLERK

(UNPUBLISHED)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-6592

JAMES CALVIN MITCHELL,

Plaintiff-Appellant

v.

JAMES MARTIN, Governor;
NATHAN RICE; BOBBY WATSON;
BOB SEYMORE,

Defendants-Appellees,

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Chief District Judge. (C/A No. 86-235-CRT)

Argued: October 5, 1988 Decided: January 12, 1989

Before RUSSELL, PHILLIPS, and CHAPMAN, Circuit Judges

Mack Sperling (BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD on brief) for Appellant. Sylvia Hargett Thibaut, Assistant Attorney General (Lacy H. Thornburg, Attorney General; David Parker, Associate Attorney General on brief) for Appellee.

PER CURIAM:

James Calvin Mitchell, a North Carolina inmate, brought this 42 U.S.C. § 1983 action for damages against the Governor of North Carolina, the Warden of Central Prison, the Associate Warden, and the Prison Program Director, alleging that actions taken by the defendants while he was incarcerated amounted to violation of his Fourteenth and Eighth Amendment rights. Summary judgment was granted in favor of the defendants. Upon appeal, this Court affirmed in part, vacated in part, and remanded the claim of the plaintiff that the defendants had violated his Eighth Amendment rights in imposing restrictions on his right to exercise.

Thereafter, the defendants-appellees filed a petition for rehearing, contending that this court should rehear its decision to remand plaintiff's claim regarding denial of exercise and outdoor activity, and that the decision was in conflict with decisions of the Supreme Court and of this Circuit. The petition for rehearing was granted and the case was set down for formal briefing and oral argument.

For the reasons stated in our previous opinion[1] we order that the entry of summary judgment on plaintiff's claim of denial of exercise and outdoor activity be vacated, and that the case be

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1 *James Calvin Mitchell v. James Martin, et al.*, No. 87-6592 (4th Cir.), December 17, 1987, unpublished).

remanded to the District Court for the development of additional facts on this issue, particularly whether the plaintiff offered any proof of injury, with an opportunity to both parties to present any additional evidence they may desire.

REVERSED IN PART

and

REMANDED WITH INSTRUCTIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

JAMES C. MITCHELL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	86-235-CRT
	)	
GOVERNOR JAMES MARTIN, et al.,	)	
	)	
	)	
Defendants.	)	

SUPPLEMENTAL AFFIDAVIT

I, BOBBY R. WATSON, being first duly sworn, do depose and say that:

I am employed by the North Carolina Department of Correction, Division of Prisons, as the Associate Warden for Operations at Central Prison in Raleigh, North Carolina.

Central Prison houses approximately one thousand (1000) of the most violent and dangerous inmates in the North Carolina prison system. Under the classification system in effect at the time of the events in this matter, inmate James C. Mitchell was housed at Central Prison in maximum custody, assigned to intensive management. The policy providing for assignment to intensive management, codified as 5 NCAC 2C .0401 (now revised and renamed simply "maximum custody", see i.e. 5 NCAC 2C .0401 et seq.), defined the function of intensive management as "isolat[ing] inmates that pose an imminent threat to the life or health of other inmates or the staff of the unit or

institution involved." Thus, this assignment for inmate Mitchell meant that his presence in the general population was believed to pose a clear and present danger to the physical well-being of other inmates or members of the staff.

Departmental policy, codified at 5 NCAC 2C .0303(d), provides that inmates who are assigned to intensive management (now known as maximum custody) may be further restricted as to their outside cell activities "[i]n any instance where an inmate has seriously assaulted or threatened to assault staff or other inmates if allowed outside the cell...." The first such restriction is that the inmate only be allowed outside his cell while in security restraints (hand and leg cuffs). If the use of these restraints fails to resolve the threatening and dangerous behavior, further restrictions may be imposed, including a restriction which only allows the inmate to leave his cell, while handcuffed and legcuffed, to shower. The inmate is given notice of the recommendation that such restrictions be applied and appears before a committee for their approval or disapproval of the recommended restrictions.

I made recommendations that inmate Mitchell be restricted to his cell, except for showers, on two occasions as a result of the clear and present danger I perceived him to represent to both staff and inmates. Copies of those recommendations are attached to my original affidavit, marked as Exhibits D and K. Inmate Mitchell was given notice of these recommendations. Copies of the notices are attached to the affidavit originally submitted by Mr. R. B. Seymour, Program Director for Classification at Central Prison, and marked as Exhibits A and H.

Once I have made recommendations for further restrictions for maximum custody inmates, and those recommendations have been approved and are in place, I regularly review such an inmate's behavior in order that I can recommend the removal of these restrictions as soon as I believe they are no longer necessary.

I did so in inmate Mitchell's case. I met with my shift commanders at least once a month and discussed with them the restrictions on inmate Mitchell, as well as the restrictions on all other inmates in the maximum security area. I discussed the restricted inmate's behavior, his disciplinary violations, and all other relevant matters, as well as sought and received recommendations from the shift commanders. When all these factors were taken into consideration, and indicated removal of the restrictions, I so recommended. Copies of the recommendations I made requesting removal of inmate Mitchell's restrictions are attached to my original affidavit and marked as Exhibits I and L (see also Exhibit J).

In summary, inmate Mitchell was, and still may be, a very violent and assaultive, as well as unpredictable, inmate. His convictions are all for very violent crimes, including murder, armed robbery and assault with a deadly weapon with intent to kill resulting in serious injury. His sentences total seventy (70) years. He has incurred over seventy-six (76) prison rule infractions, many of which were assaultive in nature. See Exhibit A attached to Nathan Rice's original affidavit. Mitchell has attempted to escape by seizing a .357 magnum pistol from a Wake County Deputy Sheriff he overpowered on December 13, 1983 while appearing in the Wake County Courthouse. It appears this inmate believed he simply had nothing to lose by being as assaultive as possible. The only way to control him, in the professional opinion of prison officials, including myself, was through the use of restrictions on his out-of-cell activities. Departmental policy provides for just such restrictions and, in this case, the restrictions worked, as demonstrated by inmate Mitchell's eventual promotion out of the restrictions. Moreover, no further staff nor inmates were injured subsequent to imposition of the restrictions, which was the ultimate reason for the restrictions. Further, Mitchell never complained to me, or to anyone else to my knowledge, that the restrictions were adversely affect-

ing his health. I have attached hereto copies of all the grievances filed by Mitchell during the times he was restricted to his cell, marked as Exhibits Z-1 through Z-7. A review of those grievances reveals not only that Mitchell made no complaint about his health as a result of the restrictions, but also that he exhibited a very hostile and assaultive attitude. See especially Exhibit Z-6; see also Merkel affidavit and medical records attached thereto.

I have also attached to this affidavit a copy of a departmental manual about exercise marked as Exhibit Y, which is distributed to segregated inmates at Central Prison. This particular version has been given to segregated inmates since the first part of 1986. I believe a previous version was distributed in 1980, but I have been unable to locate a copy of it. At any rate, a review of this manual reveals that an inmate who is restricted to his cell is not deprived of exercise but may in fact carry out extensive exercise. The maximum security cells, where Mitchell was housed, contain sixty-seven (67) square feet of space (approximately 7 feet x 9 feet). Not only is there sufficient room for exercise therein in my opinion, but this Court held in a previous opinion that an inmate could exercise sufficiently under such constraints. See Memorandum and Recommendation, at pp. 4-6, in ***Dizor v. Creecy, et al.***, No. 87-800-CRT (February 2, 1989)(copy attached); see also ***Hollingsworth, et al. v. Stephenson, et al.***, No. 84-6688 (4th Cir. November 6, 1985)(copy attached). Thus, the restrictions placed on Mitchell did not deprive him of exercise opportunities.

Since this complaint has been filed, it has come to my attention that my recommendations, and the approval of those recommendations by the Director's Classification Committee (previously the Director's Review Sub-committee) were not always followed by the staff actually assigned to the maximum custody cellblocks. See, i.e., affidavits of Correctional Sergeant Tennyson R. Stewart, Correctional Sergeant Ellis H. Langdon,

Correctional Officer D.W. Jones, Correctional Officer Antonio Caldwell, Correctional Officer L.O. West, Correctional Officer Ernest B. Smith, Correctional Officer Henry P. Royster, Correctional Officer Billy J. Blackmon, Correctional Officer K.D. Wilkins, and Correctional Officer Douglas L. Williams. My only response to this failure to follow the restrictions is that the staff was very lucky that no assaultive incident occurred. If I had been aware at the time that the restrictions were not being followed, the staff would have been subject to disciplinary measures.

Finally, I personally do not have the authority to place restrictions on an inmate's out-of-cell activities. I **only** have the authority to **recommend** those restrictions. Out-of-cell restrictions can only be imposed by the Director's Classification Committee (formerly the Director's Review Sub-committee). 5 NCAC 2 C .0303(d)(1)(A) **et seq.**

In summary, I deny that I have ever intentionally violated inmate Mitchell's constitutional rights.

This the 19 day of April, 1989.

/s/ BOBBY R. WATSON
Affiant

Sworn to and subscribed before me this
19 day of April, 1989.
/s/ James Ray Moody
Notary Public
My Commission Expires: 4-25-90

EXHIBIT Z-1

DC-410
Rev. 10/83

GRIEVANCE FORM

NAME /s/ Karim Abdul Akbar
A.K.A. James C. Mitchell 21157-0S
LOCATION AU-205

/s/ J.R. Jones 1-18-85 2:15 p.m.
Receiving Officer's Signature Date & Time

DATE 1-18-85TIME 1:30

A. GRIEVANCE STATEMENT
(Attach additional pages if necessary)

See attached page

/s/ Karim Abdul Akbar
A.K.A. James Calvin Mitchell
Inmate's Signature

B. EVALUATION
(Attach additional pages if necessary) (To be completed within 24 hours)

My investigation has revealed that this grievance has been answered previously and that it was determined that no change would be made in the operations in this area.

/s/ Lt. B.W. Birdsong, 1-21-84, 11:00 p.m.
Investigator's Signature Date & Time

C. ACTION RECOMMENDED/TAKEN
(To be completed within 5 days)

The issues pointed out in this Grievance has been addressed previously. policy states that the lights will be dimmed at 11:00 p.m. and all activities will cease. This has been done in accordance with policy. The T.V.'s are turned off at 11:00 p.m. in accordance with policy. No further action recommended.

/s/ Capt. J.B. French
Superintendent's Signature & Date

D. AGREE X APPEAL TO AREA BOARD /s/ J.C.M. 1-22-85
Inmate's Signature & Date

E. GRIEVANCE REVIEW BOARD RECOMMENDATION
(AREA/INSTITUTIONAL LEVEL)
(To be completed within 15 days)

This grievance submitted by James C. Mitchell has been reviewed. Refer to both Section B and C for evaluation and official response by staff. No further action recommended.

/s/ Capt. R.G. Chamblee
Member

Membe

K.H. 2/1/85
rArea Administrator/Inst. Head & Date

F. ___ AGREE WITH ACTION TAKEN
_X_ APPEAL TO INMATE GRIEVANCE COMMISSION

/s/ J.C.M. 1-25-85
Inmate's Signature & Date

I filed a grievance as to why these cell lights has got to be burning bright in the daytime. And that question wasn't answered I also asked why is the T.V. cut off at 3 min till 11:00, 2 min till 11:00 ect. and the cell lights are not cut off until 11:30 to 12:00. Now since you state that its so you can see. Then why do you officals stand in front of inmates cells and shine their flashlight in their face until they wake up. And that be around 2 to 4:00. And you lied too. Yeah you feed us at 5:30 sometime. But you cut these lights on at 5:00 and open these trap doors at 5:00 to 5:15. You don't sleep in your house with your lights on dim or bright so why you expect us to sleep with lights on dim and bright. This whole system is full of lies and evil genocidial ways. You're all a bunch of people that build your ego by being able to give another MAN orders. YOU ALL AIN'T NOTHING But LIARS. YOU'RE the ONES that should be in PRISON. You people ain't NOTHING but RACIST Bent on GENOCIDE.

EXHIBIT Z-2

DC-410
Rev. 10/83

GRIEVANCE FORM

M4590-383-21157-O.S.
NAME /s/ Karim Abdul Akbar
A.K.A. James C. Mitchell 21157-0S
LOCATION AU-205

/s/ R.D. Moore 2-27-85 5:00 p.m
Receiving Officer's Signature Date & Time

.DATE 2-27-85 TIME 5:00

A. GRIEVANCE STATEMENT
(Attach additional pages if necessary)
See attached pages 1 and 2

/s/ Karim Abdul Akbar
A.K.A. James C. Mitchell
Inmate's Signature

B. EVALUATION (Attach additional pages if necessary)
(To be completed within 24 hours)
See attached memo A85-2.44 dated 2-28-85. No further action necessary.

/s/ James E. Taylor 10:15 a.m. 3-04-85
Investigator's Signature Date & Time

C. ACTION RECOMMENDED/TAKEN
(To be completed within 5 days)
See attached. No further action recommended.

/s/ Capt. E.G. Chamblee
Superintendent's Signature & Date

D ___.AGREE X APPEAL TO AREA BOARD /s/ J.C.Mitchell 3-5-85
Inmate's Signature & Date

E. GRIEVANCE REVIEW BOARD RECOMMENDATION (AREA/INSTITUTIONAL LEVEL)

(To be completed within 15 days)

This grievance submitted by James C. Mitchell has been reviewed. Refer to attached statement from staff for an official response. Further action unnecessary.

/s/ Lt. Chambles — K.H. 3/8/85

Member — Member — Area Administrator/Inst. Head & Date

F. AGREE WITH ACTION TAKEN

X APPEAL TO INMATE GRIEVANCE COMMISSION

/s/ Karim Abdul Akbar 3-7-85

Inmate's Signature & Date

I demand a reasonable explaination as to why I am being discriminated against. I was charged with stabbing two inmates and was given 1 to 30 days in disiplinary segregation and loss of 30 days goodtime. I was also placed in Full Chain Restraints and given 30 years in Wake County Court. I stayed in F.C.R. (Full Chain Restraints) for 1 year. And 6 or 7 months of that year I wasn't allowed outside my cell other Than visitation or meet one of these prison boards. Now why all this punishment? Another inmate here at Central Prison "killed" a Black inmate name James Harris in COLD BLOOD. The inmate that killed James Harris name is Mark Vechnak who is Caucasain was "Not" placed in Full Chain Restraints nor was Mark Vechnak taken to Wake County Court and tried for premeditated first degree murder, nor was Mark Vechnak placed in disciplinary segregation, nor was Mark Vechnak placed in one of the Intensive Management Lock-up Blocks. What I want to know is why am I being placed in F.C.R. just for taking a mop wringer and hitting the flex glass window of the Control Booth. Now if I am going to be placed in F.C.R. for taking a mop wringer to the Flex Glass of the Control Booth window, then I have no other alternative but to file a U.S.C. 1983 Form and å Class Action Suite against this institution and its Commanders and Personel. Because this what YOU ALL are doing to me is an ACT of Racial Discrimination.



OFFICE MEMORANDUM

TO: R.B. Seymour, Program Director I DATE: 2-28-85

FROM: /s/ Bobby R. Watson, Associate Warden for Operations

RE: Inmate James C. Mitchell 21157-OS -
Referral for Special Restrictions

In July, 1983 the DCC restricted the out of cell activities and Law Library privileges of James C. Mitchell due to his assaultive behavior. These restrictions remained in effect until February, 1984 at which time they were removed as a result of his improved conduct.

As of this date, I have reinstated these special restrictions pending a referral to you and the DCC. On February 26, 1985, inmate Mitchell was in the dayroom when he refused instructions by the officer to go back to his cell. Mitchell picked up a mop wringer and started beating on the window to the control station. This is the same type action that resulted in the special restrictions being placed on him back in July, 1983. It is my recommendation that the DCC approve a restriction of his Law Library privileges and all other out of cell activities with the exception of a shower each day after which he will be immediately returned to his cell. The shower will take place with Mitchell in full restraints.

Your prompt attention to this request is appreciated.

cc: Deputy Warden Dixon
Associate Warden Harris
Capt. Chamblee
Inmate Record
- file -

EXHIBIT Z-3

DC-410
Rev. 10/83

GRIEVANCE FORM

M4590-383-21157-O.S.
NAME /s/ Karim Abdul Akbar
A.K.A. James C. Mitchell 21157-0S
LOCATION AU-205

/s/ T.L. Porter DATE 2-28-85 TIME ___
Receiving Officer's Signature Date & Time

A. GRIEVANCE STATEMENT
(Attach additional pages if necessary)
See attached page 1

/s/ Karim Abdul Akbar
A.K.A. James C. Mitchell
Inmate's Signature

B. EVALUATION (Attach additional pages if necessary)
(To be completed within 24 hours)
See attached memo A85-2.44 dated 2-28-85. No further action necessary.

/s/ James E. Taylor 10:15 a.m. 3-04-85
Investigator's Signature Date & Time

C. ACTION RECOMMENDED/TAKEN
(To be completed within 5 days)
See attached. No further action recommended.

/s/ Capt. E.G. Chamblee
Superintendent's Signature & Date

D. AGREE X APPEAL TO AREA BOARD /s/ J.C.Mitchell 3-5-85
Inmate's Signature & Date

E. GRIEVANCE REVIEW BOARD RECOMMENDATION
(AREA/INSTITUTIONAL LEVEL)
(To be completed within 15 days)

This grievance submitted by James C. Mitchell has been reviewed. Refer to attached statement from staff for an official response. Further action unnecessary.

/s/ Lt. Carroll
Member

Member

K.H. 3/8/85
Area Administrator/Inst. Head & Date

F. ___AGREE WITH ACTION TAKEN
_X_APPEAL TO INMATE GRIEVANCE COMMISSION

/s/ Karim Abdul Akbar 3-7-85
Inmate's Signature & Date

On tuesday February 26, 1985 I damaged state property. As a result I do "NOT" have shower, dayroom or recreation privileges and have been placed in Special Restraints. I have "NOT" threatened to assault any staff member or prisoner, nor did I assault such persons, nor did I attempt to assault such persons. According to administrative rules and policies 5 NCAC 2C Classification 0303 Conditions of Confinement I am being UNLAWFULLY RESTRAINED.

OFFICE MEMORANDUM

TO: R.B. Seymour, Program Director I DATE: 2-28-85

FROM: Bobby R. Watson, Associate Warden for Operations

RE: Inmate James C. Mitchell 21157-OS -
Referral for Special Restrictions

In July, 1983 the DCC restricted the out of cell activities and Law Library privileges of James C. Mitchell due to his assaultive behavior. These restrictions remained in effect until February, 1984 at which time they were removed as a result of his improved conduct.

As of this date, I have reinstated these special restrictions pending a referral to you and the DCC. On February 26, 1985, inmate Mitchell was in the dayroom when he refused instructions by the office to go back to his cell. Mitchell picked up a mop wringer and started beating on the window to the control station. This is the same type action that resulted in the special restrictions being placed on him back in July, 1983. It is my recommendation that the DCC approve a restriction of his Law Library privileges and all other out of cell activities with the exception of a shower each day after which he will be immediately returned to his cell. The shower will take place with Mitchell in full restraints.

Your prompt attention to this request is appreciated.

cc: Deputy Warden Dixon
Associate Warden Harris
Capt. Chamblee
Inmate Record
file

EXHIBIT Z-4

DC-410
Rev. 10/83

GRIEVANCE FORM

M4590-383-21157-O.S.
NAME /s/ Karim Abdul Akbar
A.K.A. James C. Mitchell 21157-0S
LOCATION AU-205

/s/ T.L. Porter 2-28-85 7:27 a.m.
Receiving Officer's Signature Date & Time

DATE 2-28-85 TIME 7:30 a.m.

A. GRIEVANCE STATEMENT
(Attach additional pages if necessary)

See attached page 1

/s/ Karim Abdul Akbar
A.K.A. James C. Mitchell
Inmate's Signature

B. EVALUATION (Attach additional pages if necessary)
(To be completed within 24 hours)

See attached memo A85-2.44 dated 2-28-85. No further action necessary.

/s/ James E. Taylor 10:15 a.m. 3-04-85
Investigator's Signature Date & Time

C. ACTION RECOMMENDED/TAKEN
(To be completed within 5 days)

See attached. No further action.

/s/ Capt. E.G. Chamblee
Superintendent's Signature & Date

D. AGREE X APPEAL TO AREA BOARD

/s/ J.C.Mitchell 3-5-85
Inmate's Signature & Date

E. GRIEVANCE REVIEW BOARD RECOMMENDATION
(AREA/INSTITUTIONAL LEVEL)
(To be completed within 15 days)

This grievance submitted by James C. Mitchell has been reviewed. Refer to attached statement from staff for an official response. Further action unnecessary.

/s/ Lt. Carroll — Member
Member
K.H. 3/8/85 — Area Administrator/Inst. Head & Date

F. ___AGREE WITH ACTION TAKEN
_X_ APPEAL TO INMATE GRIEVANCE COMMISSION

/s/ Karim Abdul Akbar 3-7-85
Inmate's Signature & Date

On tuesday February 26, 1985 I damaged state property. As a result I do "NOT" have shower, dayroom or recreation privileges and have been placed in Special Restraints. I have "NOT" threatened to assault any staff member or prisoner, nor did I assault such persons, nor did I attempt to assault such persons. According to administrative rules and policies 5 NCAC 2C Classification 0303 Conditions of Confinement I am being UNLAWFULLY RESTRAINED.

OFFICE MEMORANDUM

TO: R.B. Seymour, Program Director I DATE: 2-28-85

FROM: /s/ Bobby R. Watson, Associate Warden for Operations

RE: Inmate James C. Mitchell 21157-OS -
Referral for Special Restrictions

In July, 1983 the DCC restricted the out of cell activities and Law Library privileges of James C. Mitchell due to his assaultive behavior. These restrictions remained in effect until February, 1984 at which time they were removed as a result of his improved conduct.

As of this date, I have reinstated these special restrictions pending a referral to you and the DCC. On February 26, 1985, inmate Mitchell was in the dayroom when he refused instructions by the office to go back to his cell. Mitchell picked up a mop wringer and started beating on the window to the control station. This is the same type action that resulted in the special restrictions being placed on him back in July, 1983. It is my recommendation that the DCC approve a restriction of his Law Library privileges and all other out of cell activities with the exception of a shower each day after which he will be immediately returned to his cell. The shower will take place with Mitchell in full restraints.

Your prompt attention to this request is appreciated.

cc: Deputy Warden Dixon\
Associate Warden Harris
Capt. Chamblee
Inmate Record
file

EXHIBIT Z-5

DC-410
Rev. 10/83

GRIEVANCE FORM

M4590-383-21157-O.S.
NAME /s/ Karim Abdul Akbar
A.K.A. James C. Mitchell 21157-0S
LOCATION AU-205

/s/ T.L. Porter
Receiving Officer's Signature Date & Time

DATE 2-28-85 TIME

A. GRIEVANCE STATEMENT
(Attach additional pages if necessary)
See attached page 1

/s/ Karim Abdul Akbar
A.K.A. James C. Mitchell
Inmate's Signature

B. EVALUATION (Attach additional pages if necessary)
(To be completed within 24 hours)
See attached memo A85-2.44 dated 2-28-85.

/s/ James E. Taylor/3-5-95/9:00 a.m.
Investigator's Signature Date & Time

C. ACTION RECOMMENDED/TAKEN
(To be completed within 5 days)
See attached. No further action.

/s/ Capt. E.G. Chamblee
Superintendent's Signature & Date

D. ___ AGREE _X_ APPEAL TO AREA BOARD

/s/ J.C.Mitchell 3-5-85
Inmate's Signature & Date

E. GRIEVANCE REVIEW BOARD RECOMMENDATION
(AREA/INSTITUTIONAL LEVEL)
(To be completed within 15 days)

This grievance submitted by James C. Mitchell has been reviewed. Refer to attached statement from staff for an official response. Further action unnecessary.

/s/ Lt. Caswell
Member

Member

K.H. 3/8/85
Area Administrator/Inst. Head & Date

F. ___AGREE WITH ACTION TAKEN
X APPEAL TO INMATE GRIEVANCE COMMISSION

/s/ Karim Abdul Akbar 3-7-85
Inmate's Signature & Date

On tuesday February 26, 1985 I damaged state property. As a result I do "NOT" have shower, dayroom or recreation privileges and have been placed in Special Restraints. I have "NOT" threatened to assault any staff member or prisoner, nor did I assault such persons, nor did I attempt to assault such persons. According to administrative rules and policies 5 NCAC 2C Classification 0303 Conditions of Confinement I am being UNLAWFULLY RESTRAINED.

OFFICE MEMORANDUM

TO: R.B. Seymour, Program Director I DATE: 2-28-85

FROM: Bobby R. Watson, Associate Warden for Operations

RE: Inmate James C. Mitchell 21157-OS -
Referral for Special Restrictions

In July, 1983 the DCC restricted the out of cell activities and Law Library privileges of James C. Mitchell due to his assaultive behavior. These restrictions remained in effect until February, 1984 at which time they were removed as a result of his improved conduct.

As of this date, I have reinstated these special restrictions pending a referral to you and the DCC. On February 26, 1985, inmate Mitchell was in the dayroom when he refused instructions by the office to go back to his cell. Mitchell picked up a mop wringer and started beating on the window to the control station. This is the same type action that resulted in the special restrictions being placed on him back in July, 1983. It is my recommendation that the DCC approve a restriction of his Law Library privileges and all other out of cell activities with the exception of a shower each day after which he will be immediately returned to his cell. The shower will take place with Mitchell in full restraints.

Your prompt attention to this request is appreciated.

cc: Deputy Warden Dixon
Associate Warden Harris
Capt. Chamblee
Inmate Record
file

EXHIBIT Z-6

DC-410 GRIEVANCE FORM
Rev. 10/83

M4590-383-21157-O.S.
NAME /s/ Karim Abdul Akbar
A.K.A. J. C. Mitchell 21157-0S
LOCATION AU-205

/s/ Lt. Nobles 12:08 a.m. 10-15-85 DATE 10-15-85 TIME 12:08
Receiving Officer's Signature Date & Time

A. GRIEVANCE STATEMENT
(Attach additional pages if necessary)

I've been in chains since february, 1985, due to the fact that I hit the Plexis Glass (cont page 1,2,3,4)

/s/ J.C. Mitchell
Inmate's Signature

B. EVALUATION (Attach additional pages if necessary)
(To be completed within 24 hours)

You were placed in Full Restraints due to your assaultive and aggressive behavior. Your case is reviewed every six months by the board and periodically by Associate Warden Watson.

/s/ Sgt. (illegible) 10-15-85 1:00 p.m.
Investigator's Signature Date & Time

C. ACTION RECOMMENDED/TAKEN
(To be completed within 5 days)

Agree with Section B.

/s/ K.E. Parker, Lt. 10-15-82 1:00 p.m.
Superintendent's Signature & Date

D. AGREE X APPEAL TO AREA BOARD

/s/ J.C.Mitchell 3-5-85 1:40 p.m.
Inmate's Signature & Date

E. GRIEVANCE REVIEW BOARD RECOMMENDATION
(AREA/INSTITUTIONAL LEVEL)
(To be completed within 15 days)

The grievance submitted by inmate Mitchell has been reviewed by the Board, refer to Section B for official staff response. No further action recommended.

/s/ Lt Carroll
Member

Member

K.H. 10/25/85
Area Administrator/Inst. Head & Date

F. ___AGREE WITH ACTION TAKEN
X APPEAL TO INMATE GRIEVANCE COMMISSION

J.C. Mitchell 10-21-85
Inmate's Signature & Date

window with a mop wringer. I've met different boards. And each time, their excuse for keeping me in chains is because of my behavior when I went to Court in Wake County, and It was said that I attacked a Deputy Sheriff and took his .357 magnum service revolver. And set fire to Wake County Jail. Now I've met Mr. Seymour's board twice and met the D.R.S.C. Board twice. And this last time I met the D.R.S.C. Board, Mr. Seymour was a member of the board. I know there is a conspiracy against me. Because other inmates have assaulted inmates and been placed in chains and out of chain within the next 30 to 60 days. And I know for a fact some of their records are worser than mine. Because I been knowing them for years. But yet in still I'm being held in chains. Only to come out of my Cell for a fifteen minute shower (which I refuse to take in chains. I know its a conspiracy against me. Because an INMATE that I've been knowing for years and a few others that I just met told me that 3 sargents and 2 Lt. (whose names I won't mention offered them $100 (ONE Hundred Dollars and a SHANK if they would KILL me when they open my door for a shower (while I'm in chains). IF any fool stab or kill me thats how he got to do it. Or catch me when I'm sleep. These police set James Harris up and got him killed. And they set Willie Grandford up and almost got him killed. They set Billy Clark up and almost got him killed. Now they're trying to set me up. I'm a MAN and a WARRIOR. I'll walk through the shadow of DEATH (without chains on) and fear no evil. Because ALLAH will guide me in battle. But I won't walk in chains, knowing I have no way possible to defend myself. And I won't shower in chains. I ain't about to rely on no police to save me from getting stabbed up. Not when I know they'll stand back and watch, and have set the whole thing up. They can't set me up when I'm NOT in chains. Because they know it will be a blood war. I know how to use a shank and I know how to fight with my hands and feet as lethal weapons. I'm not registered, but I know what I can do. So I want to know why I'm being kept in chains other than trying to be set up. I'm NOT going to WALK or SHOWER in chains. If you want me dead. Then let me out of chains. But remember, it take A__ to get A__ and I ain't running from Sh__. I never have, and never will. If you want me dead so Da_n bad. Then let me out of chains and give your flunkies knives and shanks and send them my oh, NO, I'm not going to attack one da_n soul when I get out of chain. But best not no Da_n soul attack me if he wants to live. Because I'll die for what is mine. And this body is mine for my soul to live in until judgement day. Or until ALLAH says I have to give this body up so my soul can rest until its judgement day. So come on with it. But you better not slip. Because I'm not running and hiding. I don't fear

man I fear ALLAH. Man can only hurt the body. ALLAH can hurt both soul and body.

Karim Abdul Akbar
A.K.A./James Calvin Mitichell
21157-O.S.

ALLAH-U AKBAR

EXHIBIT Z-7

AU-202

DC-410 GRIEVANCE FORM
Rev. 10/83

M4590-383-21157-O.S.
NAME /s/ James C.Mitchell 21157-OS
LOCATION CENTRAL PRISON

/s/ J.E. Jeffrey 12-24-85 11:30 DATE 12-24-85 TIME 10:30
Receiving Officer's Signature Date & Time

A. GRIEVANCE STATEMENT
(Attach additional pages if necessary)

I would like to know why these guys in full chain restraint doors are being see attached pages (1,2,3,4)

/s/ James Calvin Mitchell
Inmate's Signature

B. EVALUATION (Attach additional pages if necessary)
(To be completed within 24 hours)

The food passage doors for the full restraint inmates are not locked at all times. Your food passage door is locked because of a memorandum wrote by Lt. Polk on second shift 11-14-85.

/s/ Sgt. F.S. Walker 12-27-85 11:15 a.m.
Investigator's Signature Date & Time

C. ACTION RECOMMENDED/TAKEN
(To be completed within 5 days)

See Section B.

/s/ K.E. Parker, Lt. 12-27-85
Superintendent's Signature & Date

D. AGREE X APPEAL TO AREA BOARD

/s/ J.C.Mitchell 12-31-85
Inmate's Signature & Date

E. GRIEVANCE REVIEW BOARD RECOMMENDATION
(AREA/INSTITUTIONAL LEVEL)
(To be completed within 15 days)

Inmate refused to complete sec D - No further action. Your demonstrated behavior has required that the full restraint only be continued.

/s/ Lt. Carroll — Member
Member
K.H. 1/6/86 — Area Administrator/Inst. Head & Date

F. ____AGREE WITH ACTION TAKEN
_X_ APPEAL TO INMATE GRIEVANCE COMMISSION

J.C. Mitchell 10-21-85
Inmate's Signature & Date

moved to this cell at about 7:40 p.m. and due to the amount of personal property I had, It took me until 8:00 to move all my personal belongings from segregation (AL-215) to regular lock-up (AU-202). And the two officers that escorted me while moving didn't say NOTHING TO ME about the Full Chain Restraint Inmates trap doors being locked at all times. Third shift locked my trap door after breakfast (5:30 or 5:45 a.m.) and told me the Sgt. said my trap door and all Full Chain Restraint Inmates Door are to stay locked at all times. And when Officer Oliver Massey came around passing out shaving razors he told me and the rest of the inmates in Full Chain Restraints the same thing. BUT he also added that EVER SINCE HE WAS BEEN WORKING HERE ALL Full Chain Restraints Inmates Trap Doors has always been kept locked. I know that to be a lie. So I questioned Officer Massey. His reply was, and I quote it. Write a grievance I'm only doing my damn job. Well I asked him to call the Sgt. down here and he told me he would go talk to the Sgt. I asked him what Sgt. is working and he said Sgt. Murphy. I asked Massey if he would tell the Sgt. to come down here and he said again. He would talk to Sgt. Murphy. I know who Sgt. Murphy is I think. But I've been in this prison ever since it opened and I don't ever recall hearing Sgt. Murphy being the Sgt. in Charge of A-Block. Its always has been Sgt. Hopskins, Sgt. Barefoot, Sgt. Hill, Lt. Fogg (any regular officers as active sgt.) Anyway I asked Officer W. Johnson the same thing about the trap doors. And he related to me through another inmate that he can't call the Capt or Lt. but said that Lt. Harris told all the OFFICERS in LINE-UP this morning that ALL FULL CHAIN RESTRAINTS Trap door will remain locked. He also told me that the Sgt. and Lt. is checking on it. And I just ask Officer Massey what the Sgt. Said and he told me that he talked to the Sgt. and the Sgt. and Lt. is checking on it. Well they been checking on it since 7:35 a.m. this morning and its about 12:00 and they're still checking on it. And the Sgt. Lt. Capt has not made their rounds for the day. I'm

not going to fall for no trap by refusing to move my leg or arm so he can lock my trap door. Because thats an unnecessary write-up. And they'll write me up for disobeying a direct order. As always when they write someone up. So what is the out come of these trap doors of Full Chain Restraint Inmates.

Respectfully Written
Karim Abdul Akbar
A.K.A./James Calvin Mitchell
M4690-383-21157-OS
December 24, 1985

EXHIBIT Y

North Carolina Department of Correction Manual On Exercising

Central Prison

Manual on Exercising For The Incarcerated

CENTRAL PRISON HOSPITAL

Prepared as a patient education service by the In-Service Education Department of C.P.



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THE NEED FOR EXERCISE AND PHYSICAL FITNESS

Physical fitness has a number of different meanings. To some individuals it means competing in sports events; to others it means a muscular body or absence of fatty tissue. To most people it refers to the degree to which a person is able to work and participate in recreational and other tasks of everyday life.

Physical activity for an inmate is extremely important to help reduce the weakening of body and mind which would otherwise occur in the idle institutional environment. The wise inmate becomes involved in a regular exercise program because it will make him or her feel better and time pass faster.

PHYSICAL FITNESS

The physical elements that are basic for adult fitness are muscular strength and endurance, flexibility and cardiorespiratory endurance.

Muscular Strength

Muscular strength is the ability of a muscle to exert a single, maximal force against a resistance. Lifting the heaviest weight or barbell you can handle at one time is an example of muscular strength. Weight resistance programs, such as working with barbells, are the most efficient means for gaining strength. The strength of the muscles of the human body is dependent on the size, condition, and work load placed on the muscles involved in generating the force.

Muscular Endurance

Muscular endurance is the ability of a muscle to exert force repeatedly against a resistance or to perform work continually. Lifting a weight several times or doing a maximum number of sit-ups, pull-ups or push-ups are examples of muscular endurance. The endurance of muscles is dependent upon their strength, condition, and the number of repetitions placed on the muscles involved.

Flexibility

Flexibility involves the ability to have a range of motion at a joint or series of joints. The rotation of movement at the shoulder joint, the bending and twisting of the spinal column, or stretching to touch one's toes with only a slight bend of the knees, are examples of flexibility. Toe touching with locked knees can be harmful to the beginner. The length and condition of the muscles, ligaments, and tendons largely determine the amount of movement possible at each joint.

Cardiorespiratory Endurance

Cardiorespiratory endurance is the ability to continue strenuous activity involving large muscle groups for long periods of time. In essence, it is the ability of the heart and lungs to supply oxygen and nutrients to your muscles and to remove carbon dioxide and other waste products. Three of the best examples of cardiorespiratory activities are jogging, swimming and cycling, when done continuously for an extended period of time. Cardiorespiratory endurance is the most essential physical component in adult fitness.

EXERCISE AND PHYSICAL FITNESS PROGRAMS

One of the most popular and effective programs for developing muscular strength and endurance is the weight training program (use of barbells). Many prisons have developed weight training programs not only because of the value of the program, but also because of their popularity. Some books are listed in the reference which pertain to weight training.

An isometrics training program, involving contraction of opposing muscles without movement, resulting in toning and strengthening of muscles, is more practical and applicable for a confined person, but it requires more instruction and motivation. Probably the most effective exercises available would be the traditional calisthenic program plus various other appropriate exercises. Several adult fitness books are listed in the references and would make an excellent supplement for the exercises listed in this monograph.

GUIDELINES AND RECOMMENDATIONS FOR EXERCISE PROGRAMS

The success of any exercise program depends in great part on the person's following certain guidelines or rules regarding the frequency, intensity, duration and regularity of exercising.

Frequency

The minimum number of times that one should exercise is 3 to 5 days a week. Daily exercising is recommended.

Intensity

It is important to begin with light to moderate efforts; then increase work loads and progress to higher levels of exercise as your fitness improves over weeks and months.

Duration

When beginning your program, the length of time for exercising should not be longer than 15 to 20 minutes of continuous exercise for the first 3 to 4 weeks. As your physical fitness improves, the length of time should increase up to 30 - 60 minutes of continuous exercise. These are averages and allowance should be made for your overall physical condition when you enter the program.

Regularity of Training

A daily regular workout time is important so you can better see the effects of the training.

Other guidelines to follow when exercising include:

Warm-up - A gradual warm-up is suggested because sudden strenuous exercises can cause muscle pulls and injuries to joints.

Workout - The main part of the exercise program is the workout (that is, the time spent in doing your sequence of exercises).

Warm-Down - A gradual tapering off period following strenuous activity allows the body to remove excess heat and circulation and respiration to return to their normal states.

FITNESS TEST AND EVALUATION

Since most jails are not equipped to do comprehensive fitness testing, the fitness test items selected are based on ease of administration, cost of equipment and time available. The following tests have proven practical and helpful in assessing adults prior to starting an exercise program.

Equipment

a. rug or mat on which to do sit-ups.

b. clock or watch with sweep second hand or stop-watch.



Muscular Strength and Endurance

The One-Minute Sit-up Test:

The inmate starts by lying on his/her back, knees bent at a 90° angle and heels flat on the floor. A partner holds the feet down. The inmate then performs as many correct sit-ups (see Figure 1) as possible in one minute. In the up position, the inmate should touch the elbows to the knees and then return to a full lying position before starting the next sit-up. The total number of sit-ups performed in one minute will translate into a fitness score in the norms table (see Appendix A). This test indicates the general strength and endurance of the muscular system, especially the abdominal muscle group, an area of important concern.

Equipment

a. one yardstick

b. tape or chalk for line.



Flexibility

The Bend and Reach Test:

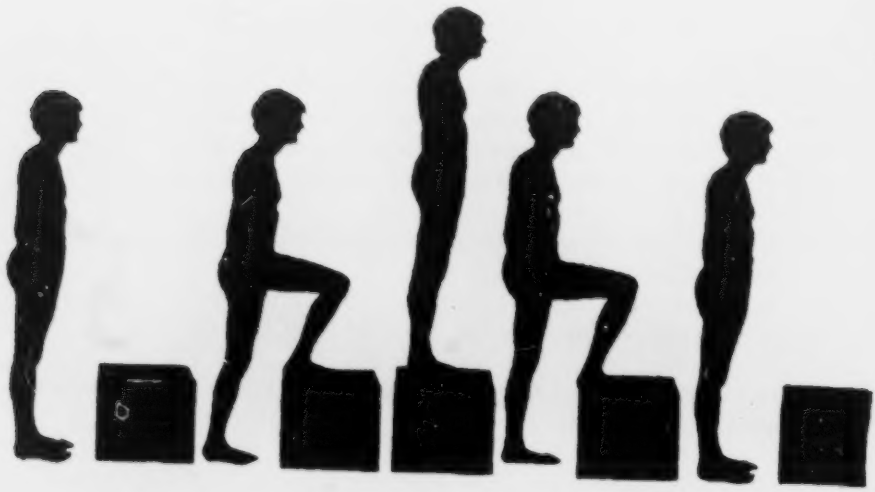
The inmate sits on the floor with legs extended at right angles to a taped or marked line, as shown in Figure 2. The heels touch the near edge of the line and are about six inches apart. A yardstick is placed between the legs of the subject and rests on the floor with

the 15 inch mark on the line. The subject slowly reaches forward with both hands as far as possible and holds the position momentarily (knees remain straight). The distance reached on the yardstick by the fingertips is recorded and the best of three trials is the flexibility score to be compared to the norms in the fitness table (see Appendix A). Prior to actual test administration, the inmate can warm-up slowly by practicing stretching. Trunk flexion serves as an important measure of hip and back flexibility and elasticity of the hamstring muscle group.

Equipment

a. 12 inch bench, step, chair or box (preferably 18 inches wide).

b. clock or watch with sweep second hand or stop-watch.



Cardiorespiratory Endurance

The Three-Minute Step Test:

The inmate starts by standing on the floor and in front of a 12-inch high box, bench, chair or step, any of which can be used for the step test.

On the signal "begin", the watch is started and one starts stepping on the bench. First the left foot up, then the right foot up, then the left foot down, then the right foot down (see Figure 3). (The count is up, up, down, down). This constitutes 4 counts. Step in cadence at 96 counts per minute or 24 complete step cycles per minute. During the three-minute test, the inmate will make 72 complete stepping cycles.

Immediately after the three minutes of stepping, the subject sits down. A 60 second heart rate is counted starting five seconds after completion of stepping. (Heart rate may best be taken on the carotid artery on the side of the throat by counting the beats for ten seconds and multiplying by six to get the rate for one minute.) The heart rate count will give a fitness score to be interpreted with the norms table (see Appendix A).

Bench stepping serves as a measure of heart and lung functioning and is a most important measure of adult fitness.

BASIC CALISTHENIC PROGRAM

By the process of elimination, the best exercise program for a confined person is built around a calisthenic program. Calisthenics are the best conditioners when cost of equipment, facilities, space, time and instruction are considered. Some other conditioners are included besides calisthenics.

Individuals should record the number of minutes spent daily on each type of exercise (see Appendix B for sample).

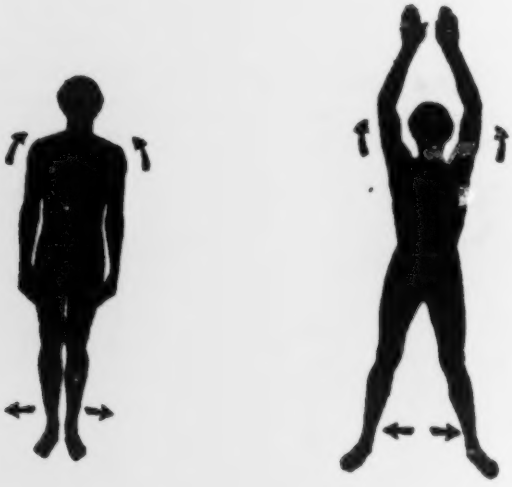
A. WARM-UP EXERCISES

Warm-up exercises should begin gently and gradually progress to more vigorous action as you prepare for the workout.

*For unconditioned persons, the warm-up exercises should be adequate for the first two to four weeks, then add Level 1 of workout.

*For all stretching movements, gradually increase the degree of stretch with each repetition and be sure to do them slowly and gently, not abruptly or forcefully.

*Do the exercises in the order listed.



Jumping Jacks:

Stand with arms at sides. Jump, spreading feet to the side and at the same time swing the arms overhead; then swing the arms down and jump back to the starting position. Use a rhythmical and comfortable count. Repeat 15 times.

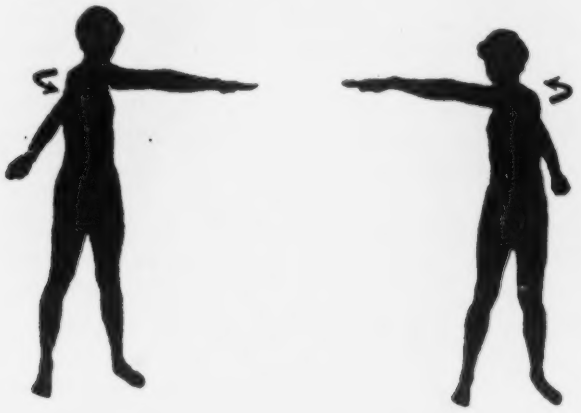


Side Stretcher:

Stand, feet slightly apart, one arm extended straight upward and the other at the side. Slowly bend to the side of the down arm as far as you can go and hold for five counts. (DO NOT bounce in an effort to lean farther down.) Then come up, switch arm positions and repeat on the other side. Repeat 5 times on each side.

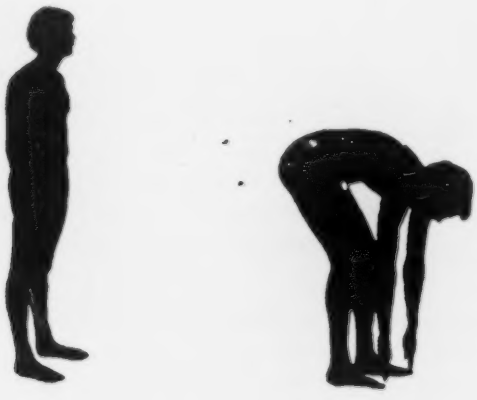
Trunk Twister:

Stand, feet comfortably apart, with arms extended out from the sides, palms down. Slowly twist to one side as far as you can go, hold for five counts, and repeat on the other side. Repeat 5 times on each side.



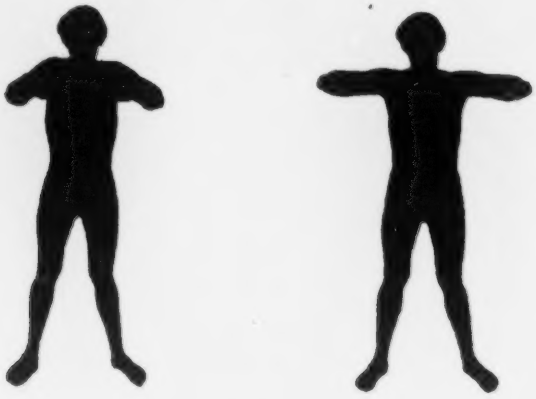
Forward Bend and Reach:

Stand with feet about 18 inches apart, knees slightly bent, arms hanging loosely at the sides. Bend forward, extend the arms between the legs and gently reach to touch the ground at about heel level. Hold for 5 counts, and then come up to a standing position. Repeat 5 times.



Shoulder Stretcher:

Stand with feet comfortably apart, with the arms bent, hands in front of the chest and the elbows out to the side. Without arching the back, rhythmically thrust the elbows backwards and return to starting position. Repeat 10 times.



Shoulder Roll:

Stand with feet comfortably apart, with the fingers of each hand touching the shoulders. Slowly rotate the elbows in a full circle - forward, up, back, and down. Repeat 5 times, then reverse the rotation.



Neck Roll:

Stand with feet comfortably apart, with hands on the hips. Gently roll the head in a full circle first to one side, then forward, then to the other side, then backward. Repeat 5 times. Reverse the direction for an additional 5 times.



Knee Lifts:

Stand with feet comfortably apart, arms at the sides. Raise one knee to the chest, grasp and gently pull it to the chest, return and repeat with other leg. Keep the back straight. Repeat 5 times with each leg.



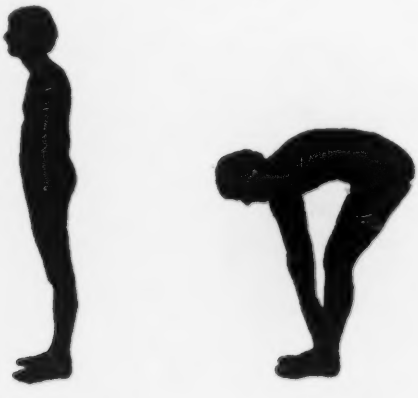
Half Knee Bend:

Stand with feet comfortably apart, hands on hips. Bend the legs to just short of a 90 degree angle (squat), extending the arms forward for balance as you go down, then return and repeat in a slow moderate pace. Repeat 10 times.



Toe Touches:

Stand with feet together, arms at sides. Keeping the knees slightly bent, lean forward and gently stretch hands toward the toes or floor. Return and repeat in a slow rhythm. (Caution: do not bob or jerk down to toes.) Repeat 10 times.



Sitting Stretcher:

Sit on floor, knees extended, your legs spread at approximately a 45 degree angle. Bend forward slowly at the waist. Reach out to the left and try to touch your head to your left knee until you feel stretching pain in the back of the leg. Hold this position for 2 or 3 seconds, then return to starting position. Reach out to the right side and do the same thing. Repeat 5 times to each side.



Slow Jog:

Stand in place with arms in a running position. Slowly jog in place or in a small circle for 60 counts or 60 seconds. Count each time the left foot strikes the floor. Begin slowly and pick up the pace gradually every 15 counts or 15 seconds. Speed can be increased as conditioning improves.



Deep Breathing:

Stand with feet comfortably apart. Slowly swing the arms forward and upward, raise up on the toes and inhale deeply until arms are in an overhead position. Swing the arms down, drop to the heels and exhale as the arms are returned to the starting position. Repeat 5 times.



B. WORKOUT

Daily Dozen Exercises

This workout uses a set of 12 exercises called the Daily Dozen set of exercises and is designed to advance the user through three levels of fitness. The Daily Dozen consists of a set of graduated exercises to be used after the warm-up exercises have prepared you physically and mentally for the workout. During the first week or two, you may be physically able to do only the warm-up exercises because of your present conditioning. When you feel ready for a complete workout, start with exercise one, Level I, of the Daily Dozen.

Workouts for this set of exercises include three levels of conditioning. The numbers in the columns to the right indicate how many times you should repeat the exercise for that level of fitness.

Work at Level I or the beginning level until your conditioning allows you to complete all of Level I without undue stress. Then progress to Level II, and finally to Level III.

Toe Touch Series:

There are four standing positions for this exercise, starting with the feet at shoulder width, then together, then crossing one foot over the other and finally reversing foot positions. Rhythmically and gently stretch and touch the toes in each of the four positions. Then return to the starting position.



LEVELS (Of Repetition)		
I	II	III
5	10	15

Squat Jumps:

LEVELS (Of Repetition)		
I	II	III
10	20	30

Stand with feet comfortably apart with one foot slightly ahead of the other and put hands behind head with fingers interlocked. Drop down to a half squat position and keep back as straight as possible. Jump to upright position with body straight and feet leaving floor. Reverse position of feet before landing and return to half squat position.



- 15 -

LEVELS
(Of Repetition)

I	II	III
10	20	30

Sprinters Drive:

Place hands on the floor at shoulder width and lean forward with one leg well up under the chest and the other fully extended to the rear. Shift leg positions in a two count rhythm.





10 15 20

Push-ups:

(Men) Lie face down on floor with hands directly under the shoulder joints, fingers pointing straight ahead. Extend the arms and raise the body in a straight line from head to heels to a fully extended position supported by the arms and toes. Lower the body in a straight line by bending the arms until the chest just touches or comes within an inch of the floor. Repeat in moderate rhythm. (Women) Same, except keep the knees in contact with floor throughout the movement.





LEVELS (Of Repetition)		
I	II	III
5	10	15

Static Stretcher:

Sit on floor with feet together, hands at sides. Without bending legs, bend truck forward, tuck head, reach forward as far as possible and grasp firmly around legs, ankles or feet according to the extent of your reach. Hold for six seconds, relax and return to starting position.



Squat Thrusts: 10 15 20

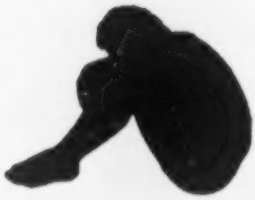
Four distinct motions are to be performed in rapid succession. Stand with your hands at your sides, then bend your knees and place your hands on the floor in front of your feet; thrust your legs back to a fully extended position; return to the squat position; then return to the erect position.



LEVELS (Of Repetition)		
I	II	III
5	10	15

Curl-ups:

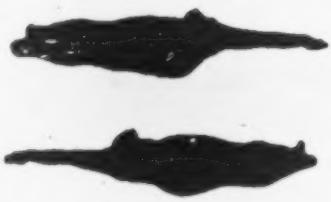
Lie flat on back, legs straight and together and with the arms extending overhead. In one motion, curl up, bring the knees up and wrap the arms around the knees. Return to the starting position. While raising up, roll the head, neck, shoulder, upper and lower back in order. Then unfold in reverse order coming down.



Leg-Overs: 10 15 20

Lie on back, legs straight and together, arms stretched sidewards at shoulder level, palms down. Lift both legs until they are perpendicular to floor, keeping them straight and together. Lower legs to the left and touch the floor. Lift to perpendicular and lower to the right side. Lift again perpendicular and return to starting position.





LEVELS
(Of Repetition)
I II III
10 15 20

Side Leg Lifts:

Lie on one side with legs together, head supported by the elbow and hand and the other hand on floor in front of body for balance. With the leg straight, lift it as far as possible and return to the start- ing position. Repeat on other side.



Double Leg Raiser: 10 15 20

Lie on back, hands under buttocks, palms down, with lower back touching floor. With knees straight, raise both legs to straight up or 90 degree position, then exhale. Lower legs slowly to floor and inhale.





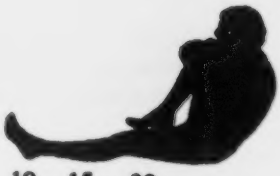
LEVELS
(Of Repetition)

I	II	III
10	15	20

Low Back Stretcher:

Lie on your back with knees straight. Pull one knee to your chest. As you do so, curl your shoulders and head toward the knee. Return to starting position and repeat exercise with other leg.





10 15 20

Prone Arch:

Lie face down with your arms extended over your head and your legs extended. Lift your right arm and left leg simultaneously and keep them extended for three to four seconds, then return to starting position. Now lift the left arm and right leg simultaneously for three to four seconds. Repeat. Do this exercise slowly; do not jerk your legs and arms.





Cardiorespiratory Exercises

	LEVELS (In Minutes) I	II	III
Select one of the following endurance exercises.			
*Jogging Jog in place or in a small circle.	1-2	4-6	8-10
*Jogging Jog in place or in small circle using alternate slow, medium and fast speeds.	1-2	4-6	8-10
*Bench Stepping Step up and down on a bench or chair (approximately 16-18" high) at the rate of 15 steps a minute (one every four seconds)l. If this pace is too easy for you, you may increase this stepping rate to one every three seconds and finally to one every two seconds. This should be only after you have gone through the three levels.	2-4	6-8	10-12

C. WARM-DOWN EXERCISES

The warm-down period is best accomplished by a continuation of activity at a lowered intensity. Keep moving for about three to five minutes. Walking, slow jogging or repeating the stretching exercises are excellent ways to return to your normal state. When heart rate and breathing return to near normal, you should finish the workout with a shower.

GLOSSARY

Cadence	A measure of rhythmical motion or a rhythmical flow of sounds.
Calisthenic Program	A series of exercises without use of equipment or with light equipment.
Cardiorespiratory	Joint functioning of the heart and lungs.
Distinc	Separate or Different.
Hamstring Muscle Group	Two groups of tendons at the back of the knee.
Intensity	Physical stress on the body during exercise, determined by measuring heart or pulse rate after exercising.
Nutrients	Basic substances of the body which are provided by foods.
Perpendicular	Straight up from the floor or at a 90° angle to the floor.
Repetition	Being repeated.
Simultaneously	At the same time.
Tendon	An extension of muscle tissue which attaches to the bone.

APPENDIX A

NORMS TABLE

FITNESS CATEGORY	ONE-MINUTE SIT-UP TEST[a] (# of Sit-ups)	BEND AND REACH TEST[b] (# of Inches Reached)	THREE-MINUTE STEP TEST[c] (Heart Beats Per Muinute)
Excellent	35 and above	22-23	84 and below
Good	30-34	20-21	85-94
Average	20-29	14-19	95 to 119
Below	15-19	12-13	120 to 129
Poor	14 and below	10-11	130 and above

a. Myers, Golding and Sinning sit-up test

b. Myers, Golding and Sinning bend and reach test

c. Kasch and Bover step test

 APPENDIX B

EXERCISE RECORD SHEET

Record Minutes Spent in Each Type of Exercise

Month: _____

WORKOUT

Day	Warm-up	LevelI	Level II	Level III	Cardiorespiratory
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					
15					
16					
17					
18					
19					
20					
21					
22					
23					
24					
25					
26					
27					
28					
29					
30					
31					

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

FILED
Feb 3 1989

LOUIS A. DIZOR, JR.,	)	
	)	
Plaintiff,	)	No. 87-800-CRT
	)	
v.	)	MEMORANDUM
	)	AND
C. CREECY, et al.,	)	RECOMMENDATION
	)	
Defendants.	)	

Plaintiff's complaint, as amended, alleges that for 199 days his exercise was restricted to ten-foot cubed fenced enclosures while he was on administrative segregation. He contends that this amounts to cruel and unusual punishment which gives rise to this Section 1983 action in which he seeks both monetary damages and injunctive relief. In an amendment dated December 30, 1987, plaintiff also complains that the North Carolina Inmate Grievance Commission was ineffective and should be "done away with." The amendment also includes a demand for a jury trial. After a number of delays in which the court has attempted to have the record supplemented with sufficient information so that the case can be ruled upon, and other delays at the request of both parties, it now appears that the defendants' motions to dismiss and for summary judgment are ready for ruling.

PLAINTIFF'S CLAIM AGAINST THE INMATE GRIEVANCE COMMISSION

In his December 30, 1987 amendment the plaintiff complained that the North Carolina Inmate Grievance Commission had dismissed his complaint of inadequate exercise facilities.

Concluding that the Grievance Commission was ineffective, plaintiff asked the court to eliminate that commission. As it developed, only two days later that portion of plaintiff's request was granted. The Inmate Grievance Commission was dissolved effective January 1, 1988 and replaced with the Grievance Resolution Board. (Chapter 746, Section 1, Session Laws of 1987.) Moreover, there is no constitutional right for any such commission. See ***Jones v. Prisoners' Labor Union***, 433 U.S. 119 (1977, Burger, C.J., concurring).

Accordingly, both for mootness and for failure to state a claim of constitutional dimension, IT IS HEREBY RECOMMENDED that defendants' motion to dismiss BE ALLOWED as to plaintiff's compliant that the North Carolina Inmate Grievance Commission is ineffective.

CLAIM OF CONSTITUTIONALLY INADEQUATE EXERCISE AREA

Plaintiff contends that for 199 days the only exercise he was allowed was one hour per day in a ten-foot cubed wire enclosed area. He further contends that because of this limitation of his exercise over a long period of time that he suffered injury to his leg and back. The defendants deny that plaintiff has suffered any injury as a result of restrictions on his exercise and further deny that restricting his exercise to a ten-foot cubed wire enclosure is constitutionally inadequate.

In affirming an opinion from this court, the Fourth Circuit has held that it is not cruel and unusual punishment to restrict the exercise allowed to intensive management inmates to these ten-foot cubed wire enclosed exercise areas for one hour each day, weather permitting. ***Hollingsworth v. Stephenson***, (unpublished) No. 84-6688 (4th Cir. November 6, 1985). (copy attached)

But it is widely accepted that some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates. ***Ruiz v. Estelle***, 679 F.2d 1115, 1152 (5th Cir. 1982), modified on other grounds, 688 F.2d 266, cert. denied 460 U.S. 10452; ***Spain v. Procunier***, 600 F.2d 189, 199 (9th Cir. 1979); ***Miller v. Carson***, 392 F. Supp. 515 (M.D. Fla. 1975); ***Rhem v. Malcolm***, 371 F. Supp. 594 (S.D.N.Y. 1974), aff'd, 507 F.2d 333 (2d Cir. 1974).

Restrictions on exercise can amount to cruel and unusual punishment if: (1) it continues for a sufficiently protracted period of time or (2) it is harmful to the prisoner's health. ***Sweet v. South Carolina Department of Corrections***, 529 F.2d 854, 866 (4th Cir. 1975); ***Ruiz v. Estelle***, supra, at 11252; ***Knop v. Johnson***, 667 F. Supp. 467, 476 (W.D. Mich. 1987). This is not inconsistent with the undersigned's Memorandum and Recommendation in ***Linder v. Hunt***, No. 81-554-CRT (E.D.N.C. 1981) (adopted by Judge Fox and affirmed by the Fourth Circuit, 714 F.2d 131 (4th Cir. 1983)), because there was no evidence that Linder's health had been harmed or that his restrictions had continued for an unduly long period.

In this case, plaintiff alleges both a long duration of restrictions and injury to his health. There appears to be no question but that plaintiff's exercise restrictions were for 199 days. The court will review the matters of record concerning plaintiff's health consequences.

It is not disputed that plaintiff has had some health problems with his lower back and left leg of some origin. He alleges that these health problems were caused by inadequate exercise during the 199 days that he was limited to the ten-foot cubed wire cages during his exercise period.

The only evidence in this file on the issue of whether plaintiff's back and leg problems were caused by restrictions on exercise for 199 days is the affidavit of Dr. Dwight G. Davis, a surgeon under contract with the North Carolina Department of Correction. Because it is critical to the disposition of this case, it is worth setting out here the relevant portions of Dr. Davis' affidavit:

> In July and August 1988 I diagnosed Inmate Dizor who was referred to me with symptoms of left sided claudication including pain. Aortography revealed 80% stenosis of left common iliac artery as well as moderate narrowing of right common iliac artery at its origin.
>
> After the patient discussed the therapeutic possibilities with Dr. Scott Thomas he has decided to undergo aorto iliac endarterectomy, to remove the arterial obstruction.
>
> The arterial obstruction is secondary to arterial schlerotic cardiovascular disease. This disease develops slowly over a long period of time. There are several factors that contribute to this disease one of which is smoking, a habit practiced by Inmate Dizor.
>
> Lack of aerobic exercise is sometimes thought to be a contributing factor to arterial sclerotic cardiovascular disease. Benefit from aerobic exercise can be obtained by a person confined to a ten foot by ten foot area for an hour per day, by doing continuous strenuous activity such as running in place or calisthenics. For that matter, Mr. Dizor could have done these exercises while con-

> fined to his cell and achieved aerobic benefit which may or may not have helped his condition.
>
> It is very doubtful that Inmate Dizor's medical problems were caused by a lack of exercise due to his being on administrative segregation for 199 days with his exercise area being limited to a ten foot by ten foot area for one hour per day.

Thus, all of the evidence is that while lack of aerobic exercise may contribute to arterial sclerotic cardiovascular disease, one can obtain adequate aerobic exercise in a ten-foot cubed enclosure. Although plaintiff attacks the credibility of Dr. Davis by pointing out that he is a consultant for the State, his testimony that one can obtain aerobic exercise in a ten-foot cubed enclosure merely comports with common sense and knowledge of such exercises as jumping jacks and running in place. Moreover, plaintiff has submitted no evidence to contradict Dr. Davis.

Plaintiff has been accorded an opportunity for aerobic exercise daily, weather permitting. The fact that he would prefer to play basketball or to run around a large track rather than run in place is immaterial. As an aside, the medical evidence suggests that if plaintiff is truly concerned about his arterial health he would be well advised to stop smoking.

Because the plaintiff has advanced no evidence that he has suffered any adverse health consequences attributable to restricting his exercise to one hour per day in ten foot cubed enclosures for 199 days, that restriction cannot be found to amount to cruel and unusual punishment. There being no constitutional deprivation, defendants' Motion for Summary Judgment should be ALLOWED.

In summary, IT IS HEREBY RECOMMENDED that defendants' Motion for Summary Judgment BE ALLOWED as to all of plaintiff's claims.

This the 2nd day of February, 1989.

/s/Alexander B. Denson
ALEXANDER B. DENSON
UNITED STATES MAGISTRATE

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 84-6688

Kenneth John Hollingsworth, Norman Terry Harris, William A. Moye, Bobby A. Barrett, Gregory Roberson, Justice E. Miller, individually and on behalf of all others similarly situated,

Appellants

versus

L.V. Stephenson, James Roe, and Sgt. Williams,

Appellees

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge. (CA 83-1411-CRT)

Argued June 6, 1985 Decided November 6, 1985

Before WIDENER and MURNAGHAN, Circuit Judges, and GORDON, District Judge for the Middle District of North Carolina, sitting by designation.

Marvin Sparrow (North Carolina Prisoner Legal Services, Inc. on brief) for Appellants; Jacob L. Safron, Special Deputy

Attorney General (Lacy H. Thornburg, Attorney General, on brief) for Appellees.

PER CURIUM:

In this civil action brought under 42 U.S.C. § 1983, plaintiffs, state court prisoners, properly classified and housed in the intensive management unit at the Caledonia Correctional Institution at Tillery, North Carolina, sought declaratory, injunctive, and compensatory relief, contending that restrictions on their opportunity to exercise violated their eighth amendment, due process, and equal protection guarantees. More specifically, plaintiffs alleged that the individual outdoor exercise areas, each enclosed by a cyclone fence, which measures ten feet in all directions, and in which intensive management inmates are allowed to exercise seven times a week for an hour each day, weather permitting, are inadequate and constitute cruel and unusual punishment. The argument goes that they are more restrictive than intensive management exercise facilities at other North Carolina prisons, and constitute additional restrictions on the plaintiffs' right to exercise that have been imposed without due process. Both plaintiffs and defendants moved for summary judgment, and in a well-reasoned opinion, the district court granted the defendants' motion and entered judgment against the plaintiffs.

With regard to the plaintiffs' eighth amendment claims, the district court held that the plaintiffs were not entitled to any relief because the eighth amendment does not prohibit exercise facilities that are merely "inadequate," and because the prison administrators acted within their broad discretion in allowing admittedly assaultive and disruptive prisoners to exercise in the outdoor exercise areas. In denying the plaintiffs' equal protection

claim, the district court emphasized that intensive management inmates at other North Carolina prisons are required to exercise in hand or leg restraints, and concluding that the plaintiffs could not plausibly argue that exercising in a ten foot square enclosed exercise area is more restrictive than exercising in hand or leg restraints. Finally, with regard to the plaintiffs' due process claim, the district court held that the enclosed exercise areas are not "additional restrictions" that give rise to the due process requirements provided for in the North Carolina prison regulations.

The plaintiffs appeal from the district court's decision. After reviewing the record, and after considering the briefs and oral argument, we affirm on the opinion of the district court. ***Hollingsworth v. Stephenson***, No. 83-1411-CRT (E.D.N.C. Oct. 31 1984).

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 86-235-CRT

FILED
Aug 9 1989

JAMES C. MITCHELL,
Plaintiff,

v.

GOVERNOR JAMES MARTIN, et al.,
Defendants.

ORDER

This civil action was initiated by the pro se filing of a complaint by North Carolina prisoner James Calvin Mitchell on March 3, 1986. The named defendants were James Martin, who is the Governor of the State of North Carolina; Nathan Rice, who was, at that time, the Warden of Central Prison in Raleigh, North Carolina; Bobby Watson, who is the Associate Warden for Operations at Central Prison; and Bob Seymour, who is a Program Director at Central Prison. Mitchell alleged that these defendants had violated his constitutional rights. Specifically, Mitchell alleged that he was forced to shower in full restraints; that he was denied any recreation activities outside his prison cell; that he was not given cleaning materials with which to clean his cell except when in full restraints; that his use of the Central Prison law library had been restricted; that he is housed on "A-Block," where the most violent and disruptive inmates in the system are housed; that the restraints placed on Mitchell were violative of his due process rights under departmental policy and racial discrimination. For relief, Mitchell requested $175,000 damages.

On July 21, 1986, the defendants moved to dismiss and, alternatively, for summary judgment. On July 20, 1987, the Honorable United States Magistrate Charles K. McCotter recommended that the defendants' motions be granted. Magistrate McCotter found that Mitchell's claims, except for damages, were moot as Mitchell was no longer housed at Central Prison. Defendant Martin was dismissed because respondeat superior does not apply under § 1983. Mitchell's eighth amendment claims were dismissed for failure to show injury and because the need for security outweighed the plaintiff's merely uncomfortable conditions of confinement. Mitchell's due process claims were dismissed as the defendants' business records demonstrated Mitchell had received proper due process concerning his classification assignments. Mitchell's access to the courts claim was denied for failure to show injury and because the need for security outweighed plaintiff's need for use of the law library. Mitchell's allegations of discrimination were dismissed because they were merely conclusory. Notwithstanding Mitchell's objections to the Magistrate's recommendations, this court adopted the recommendations in an order filed August 12, 1987. Mitchell appealed.

On December 17, 1987, the Fourth Circuit Court of Appeals affirmed the judgment of this court in all respects with the exception of plaintiff's claim that the restrictions placed on his out-of-cell activities violated the eighth amendment.[1]

---

1 This court perceives the opinion of the appellate court to have affirmed this court's dismissal of defendant Martin due to the inapplicability of respondeat superior under § 1983.

Defendants filed a petition for rehearing, which was granted by the Fourth Circuit on February 29, 1988. Defendants also requested and were granted a motion to supplement the record to include copies of the DC-141's for the periods of restriction at bar (i.e., from July 1983 through February 1984 and from March 1985 through March 1986).

On January 12, 1989, the Fourth Circuit entered an order vacating this court's entry of judgment in plaintiff's claim of denial of exercise and outdoor activity and remanded the case to this court with the following directions:

> that the case be remanded ... for the development of additional facts on [the issue of plaintiff's eighth amendment claim], particularly whether the plaintiff offered any proof of injury, with an opportunity to both parties to present any additional evidence that they may desire.

In order for the parties to have ample opportunity to comply with the instructions of the Fourth Circuit, i.e., the development of additional facts regarding plaintiff's eighth amendment claim, defendants' renewed motion for summary judgment is DENIED without prejudice at this time. Said motion may be renewed upon completion of the discovery period established pursuant to the following directives.

Counsel are directed to confer and present to the court within twenty (20) days a stipulation addressing the following issues:

(1) The length of discovery, including a date by which all discovery will be concluded.

(2) The number of interrogatories each party will serve on others.

(3) The number of depositions to be taken by each party.

(4) The time for disclosure of identity of expert witnesses, and the scheduling of depositions of experts.

If counsel cannot agree, they are to submit their respective positions on these issues directly to the Clerk in Raleigh and the court will resolve the disputed issues. Following court approval, modifications of the scheduling order will be allowed only by motion and for good cause shown.

Failure to comply with this order will result in entry of a scheduling order limiting non-responding counsel to a discovery period of four months, 50 interrogatories, ten depositions, and disclosure of expert witnesses at least 30 days prior to the expiration of discovery.

All motions (except those relating to the admissibility of evidence at trial) must be filed within 30 days after discovery concludes.

SO ORDERED.

This 9th August, 1989.

/s/ W. Earl Britt
W. EARL BRITT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

FILED
Nov 28 1989

No. 86-235-CRT

JAMES C. MITCHELL,)
)
Plaintiff,)
)
v.) ORDER
)
Defendants.)

This matter is before the court on motion by defendants asking the court to reconsider its order of 9 August 1989 denying defendants' renewed motion for summary judgment. Plaintiff has responded by memorandum filed 11 September 1989. However, in their memorandum counsel did not address the alternative reason cited by counsel for defendants in their memorandum; i.e., the applicability of ***Will v. Michigan Dept. of Police***, 57 U.S.L.W. 4677 (June 13, 1989). Counsel for plaintiff are directed to respond to that portion of defendants' brief within fourteen (14) days hereof.

This 28 November 1989.

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

FILED
Feb 1 1990

No. 86-235-CRT

JAMES CALVIN MITCHELL,

Plaintiff,

v.

GOVERNOR JAMES MARTIN, et al.,)

Defendants.

ORDER

This matter is before the court on motion by defendants for reconsideration of the order of this court dated 9 August 1989 denying defendants' renewed motion for summary judgment. Also before the court is a motion by plaintiff to amend his complaint.

Defendants urge the court to reconsider its 9 August 1989 order and enter summary judgment for them on the basis of qualified immunity. At the heart of defendants' argument is the contention that plaintiff has failed to show injury which might have resulted from the restriction on his exercise. Defendants' argument must be rejected for several reasons. First, plaintiff has filed an affidavit with the court stating that he has suffered injury. Second, although defendants contend that medical records do not support any claim of injury by plaintiff, it may very well be that plaintiff can prove that the prolonged effects of a lack of exercise produced injury. In addition, the Fourth Circuit, in its 17 December 1987 unpublished opinion, stated "under the circumstances of the instant case, where an inmate was denied all exercise for over a year, we do not think that our holding in ***Clay v. Miller***,

626 F.2d 345, 347 (4th Cir. 1980), can be construed to mean that Mitchell must first sustain an injury from this denial before he has a valid constitutional claim." Finally, in its 12 January 1989 unpublished opinion, the matter was remanded to this court "for the development of additional facts on this issue, particularly whether the plaintiff offered any proof of injury, with an opportunity for both parties to present any additional evidence they may desire."

Clearly there was abundant authority well before the deprivation which took place in this lawsuit to place defendants on notice that a failure to allow proper exercise was unconstitutional. ***Clay v. Miller***, 626 F.2d 345, 347 (4th Cir. 1980); ***Kirby v. Blackledge***, 530 F.2d 583, 587 (4th Cir. 1976); ***Sweet v. South Carolina Department of Corrections***, 529 F.2d 854, 866 (4th Cir. 1975). In addition, it would appear that defendants violated their own regulations by depriving plaintiff of proper exercise. The court therefore holds that the law was clearly established that the claimed deprivation was unlawful. Thus, qualified immunity, at least on the basis of the record presently before the court, is unavailable to defendants. It may very well be that a further development of the record, which the Fourth Circuit has ordered this court to do, may disclose something more in defendants' favor. If so, the court can, of course, take another look at the issue at that time.

The motion by defendants to reconsider the order of this court of 9 August 1989 is denied.

Plaintiff, now represented by counsel, seeks to file an amended complaint more properly clarifying his allegations and adding additional defendants. Although it would appear that plaintiff is not entitled to injunctive relief, that is a matter to be addressed at a later date. Defendants' argument that the additional defendants should not now be brought in because of the passage

of time is not persuasive. As indicated, plaintiff has appeared in this matter pro se throughout must of the long duration of this trial. Counsel was appointed during the pendency of the appeal in the Fourth Circuit and has continued that representation in this court. The additional defendants, Sanderford and Cousin, are alleged to have been Chairman of the Director's Review Committee at Central Prison at certain times pertinent to the action. It would appear from the materials presented that they must have had knowledge of the lawsuit long before this motion was made. The motion to amend the complaint is allowed with the allegations of the amended complaint to relate back to the filing of the original complaint by the pro se plaintiff. Defendants shall have twenty (20) days after the date of this order in which to file answer to the amended complaint.

The parties are directed to comply with the court's 9 August 1989 order with regard to discovery.

This 1 February 1990.

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
Civil No. 86-235-CRT

FILED
Feb. 12 1990

JAMES CALVIN MITCHELL,
Plaintiff,

v.

GOVERNOR JAMES MARTIN, et al.,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Nathan Rice, Bobby R. Watson, and R.B. Seymour, the defendants above named, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the order of the Honorable United States District Judge W. Earl Britt that summary judgment be denied the defendants, entered in this action on the 1st day of February, 1990. This appeal is pursuant to 28 U.S.C. § 1291, based on the denial of qualified immunity for the defendants. ***Harlow v. Fitzgerald***, 475 U.S. 800 (1982); ***Mitchell v. Forsyth***, 472 U.S. 511 (1985); ***Young v. Lynch***, 846 F.2d 960 (4th Cir. 1988).

This the 9th day of February, 1990.

Respectfully submitted,
LACY H. THORNBURG
Attorney General

/s/ Sylvia Thibaut
Sylvia Thibaut
Assistant Attorney General
N. C. Department of Justice
Post Office Box 629
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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES CALVIN MITCHELL, Plaintiff-Appellee,	)	
v.	)	
NATHAN A. RICE; BOBBY R. WATSON; BOB SEYMORE, Defendants-Appellants,	)	No. 90-6040
and	)	
JAMES MARTIN, GOVERNOR; J. DWIGHT SANDERFORD; GENE T. COUSIN, in their individual and official capacities, Defendants.	)	

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, District Judge.
(CA-86-235-CRT)

Argued: October 2, 1991

Decided: January 10, 1992

Before RUSSELL, HALL, and PHILLIPS, Circuit Judges.

Remanded with instructions by published opinion. Judge Russell wrote the opinion, in which Judge Hall and Judge Phillips joined.

COUNSEL

ARGUED: Sylvia Hargett Thibaut, Assistant Attorney General, Raleigh, North Carolina, for Appellants. Robert J. King, III, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, Greensboro, North Carolina, for Appellee. **ON BRIEF:** Lacy H. Thornburg, Attorney General, Raleigh, North Carolina, for Appellants. Mack Sperling, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, Greensboro, North Carolina, for Appellee.

OPINION

PER CURIUM:

This case returns to us after two prior appeals. The present appeal challenges the district court's dismissal of Appellants' summary judgment motion. Appellants, North Carolina prison officials, were defendants below in a section 1983 prisoner complaint charging that deprivation of out-of-cell exercise opportunities for extended periods of time violated the Eighth Amendment prohibition against cruel and unusual punishment. State officials filed a motion for summary judgment asserting the defense of qualified immunity. The United States District Court for the Eastern District of North Carolina, Raleigh Division, denied the motion, finding, inter alia, that abundant authority existed to place Defendants on notice that deprivation of out-of-cell exercise was unconstitutional. We affirm and remand the case to the district court for further fact finding.

I.

In December 1973, James Calvin Mitchell began serving a thirty-year sentence for second degree murder and a consecutive five-to-ten year sentence for armed robbery. He was incarcerated at Central Prison in Raleigh, North Carolina.

While incarcerated, Mitchell was charged with and convicted of various crimes committed inside prison. On April 23, 1975, Mitchell was convicted of assault with a deadly weapon with intent to kill resulting in serious injury, for which he received a three-year concurrent sentence. On November 10, 1975, Mitchell was convicted of attempted escape from prison, for which he received a four-month concurrent sentence. Five years later, on October 14, 1980, Mitchell was convicted of another assault with a deadly weapon inflicting serious injury and received a twelve-month concurrent sentence. On July 11, 1983, Mitchell was again convicted, this time on two counts of assault with a deadly weapon with intent to kill, inflicting serious injury, for which he received two consecutive sentences of ten and twenty years. Additionally, from 1973 to 1986 Mitchell incurred over seventy prison rule infractions, some of which were violent in nature.

At the time of Mitchell's July 1983 assaults, he had already been placed in maximum custody assigned to intensive management, the most restrictive custody level in the North Carolina prison system. State regulations permit intensive management assignments in order to "isolate inmates that pose an imminent threat to the life or health of other inmates or the staff of the unit or institution involved." 5 N.C. Admin. Code tit. 5, r. 2C.0401 (Dec. 1984). The regulations authorize further restrictions of outside cell activities "where an inmate has seriously assaulted or threatened to assault staff or other inmates if allowed outside the cell...." r. 2C.0300(d)1. Further restrictions

specifically approved in the regulations include security restraints (handcuffs and/or leg cuffs) for out-of-cell activities, curtailment of law library privileges, and "additional restrictions" on outside cell exercise activities. Id.

As a result of Mitchell's July 11, 1983, assaults, prison officials ordered Mitchell shackled in full restraints (hand and leg cuffs) anytime he was outside his cell. Despite these physical restraints, Mitchell's menacing behavior persisted. On July 24, 1983, while outside his cell in full restraints, Mitchell attacked the window of a Control Station room with a broom handle. This episode led Bobby R. Watson, Associate Warden for Operations at Central Prison, to recommend that Mitchell be restricted to his cell except for showers twice weekly, and then in full restraints. After notice to Mitchell and a hearing, the Director's Review Committee approved the same on July 28, 1983, and ordered subsequent review every thirty days. In accordance with regulations, prison officials provided Mitchell with an exercise manual demonstrating in-cell exercises.

On February 29, 1984, seven months after the imposition of full out-of-cell restrictions, the Director's Review Committee returned Mitchell to limited restrictions. He was then able to leave his cell for regular exercise, however, still in full restraints. During the prior seven-month period, Mitchell had been largely confined to his cell, except for semi-weekly showers.

One year after full restrictions were relaxed, Mitchell's assaultive behavior resumed. On February 26, 1985, Mitchell, in full restraints, again attacked the Control Station window with a mop wringer after refusing to return to his cell. As a result, full out-of-cell restrictions were again imposed by the Director's Classification Committee (formerly the Director's Review Committee) on April 3, 1985.

On March 14, 1986, after eleven months under full restrictions, the Classifications Committee lifted the restrictions and transferred Mitchell to Caledonia Correctional Institution. In total, Mitchell had been subjected to out-of-cell arm and leg restraints for a period of two years and eight months. For eighteen of those months he was ordered confined to a sixty-seven square foot cell[1] without any regular opportunity to exercise outside his cell or any regular exposure to different surroundings, fresh air or sunshine.

Mitchell did not file any grievances concerning his health or medical problems during the two periods of full restriction. Furthermore, his medical records do not reveal any injuries directly related to his confinement during these periods.

On March 3, 1986, Mitchell filed a pro se complaint charging Governor James Martin and various prison officials under 42 U.S.C. § 1983 with numerous Eighth Amendment violations.[2] The district court granted defendant's motion to

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1 We presume part of this space was taken up by a bed, toilet and sink, leaving Mitchell somewhat less than the 67 square feet for movement and in-cell exercise.

2 Mitchell sought both injunctive relief and damages. Even though he was out of restricted confinement and at a different prison facility at the time of filing this suit, he based his claim for injunctive relief on the likelihood of such confinement being reinstated.

Governor James Martin was dismissed as a party to this suit by oroder of the district court dated August 12, 1987. Mitchell seeks injunctive relief against the remaining defendants in their official capacities in accordance with *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2311 n. 10 (1989). Mitchell seeks damages against defendants personally as permitted by *Hafer v. Melo*, 60 U.S.L.W. 4001 (U.S. Nov. 5, 1991).

dismiss and for summary judgment upon recommendation from the United States Magistrate.

On appeal, we affirmed the district court's dismissal in all respects except one. The surviving issue, Mitchell's claim that deprivation of out-of-cell exercise for extended periods of time violated the Eighth Amendment, was vacated and remanded for further review. Prison officials then filed a petition for rehearing, which we granted. On rehearing, we remanded the exercise issue "for development of additional facts ..., particularly whether the plaintiff offered any proof of injury, with an opportunity to both parties to present any additional evidence they may desire." ***Mitchell v. Martin***, No. 87-6592, slip op. at 2-3 (Jan. 12, 1989).

Prison officials filed another motion for summary judgment in the district court, asserting a defense of qualified immunity. The district court denied the motion and prison officials now appeal.

II.

We have jurisdiction in this case under 28 U.S.C. § 1291 (1988). The Supreme Court held in ***Mitchell v. Forsyth***, 472 U.S. 511, 530 (1985), that denial of qualified immunity on summary judgment is an appealable final decision under section 1291.

We review denials of summary judgment de novo and apply the same standard of review required of a trial court. ***Smith v. University of North Carolina***, 632 F.2d 316, 338 (4th Cir. 1980). Summary judgment should be rendered if "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In making our decision, we must consider the facts in the light most favorable to the nonmoving party and draw all justifiable

inferences in that party's favor. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 255 (1986); Smith, 632 F.2d at 338.

A.

As a general rule, government officials acting reasonably within the scope of their authority are immune from both defending themselves in a legal action and possible subsequent liability. Reasonable conduct is defined as conduct which "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982). The test "generally turns on the 'objective legal reasonableness' of the actions," ***Anderson v. Creighton***, 483 U.S. 635, 639 (1987)(quoting ***Harlow***, 457 U.S. at 8198), ignoring considerations of the official's subjective intent. That is, we look to the law itself. The knowledge or intent of the particular official is irrelevant. We have previously held that the individual bringing suit against a public official bears the burden of clearly establishing the law allegedly violated. ***Clark v. Link***, 855 F.2d 156, 160-61 (4th Cir. 1988).

In determining whether or not an official violated clearly established law, we must look to the law at the time the alleged offense was committed. ***Harlow***, 457 U.S. at 818; ***Mitchell v. Forsyth***, 472 U.S. at 530. The law must be established with some particularity ***Anderson***, 483 U.S. at 640. In other words,

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. (citations omitted).

The Supreme Court constructed its test for qualified immunity by balancing competing interests "in vindication of citizens' constitutional rights and in public officials' effective performance of their duties[.]" ***Anderson***, 483 U.S. at 639 (quoting ***Davis v. Scherer***, 468 U.S. 183, 195 (1984)). In the interests of accomplishing public goals and encouraging public service, government officials should not be under the burden of defending themselves against every claim raised by an aggrieved individual, but neither should they be given free rein and the power of a governing position to infract the rights of citizens. The resulting objective test satisfies both interests by holding public officials responsible only for conduct that a reasonable official should readily be able to determine unlawful.

In reviewing appellants' qualified immunity defense, we look to substantive Eighth Amendment law as established at the time of the alleged violations. If preexisting law sufficiently established the contours of Eighth Amendment cruel and unusual punishment to include exercise deprivations, then prison officials cannot shelter themselves from liability. On the other hand, if the law was not so clearly established as to give notice to a reasonable prison official, we must permit appellants an immunity defense and dismiss this case against them. We find that prior decisions generally require that, absent unusual circumstances, some regular exercise opportunities be provided prisoners. While the bare facts on the record here indicate that some unusual circumstances may be present, we cannot, without more information, grant qualified immunity in this proceeding.

B.

We had announced several decisions on the issue of exercise limitations before the incidents Mitchell complains of

occurred. It may generally be considered that complete deprivation of exercise for an extended period of time violates Eighth Amendment prohibitions against cruel and unusual punishment.[3] However, there can be exceptional circumstances where the general rule does not apply.

This Court has repeatedly stated that when reviewing Eighth Amendment claims, courts must consider the totality of the circumstances. ***Clay v. Miller***, 626 F.2d 345, 347 (4th Cir. 1980); ***Kirby v. Blackledge***, 530 F.2d 583, 587 (4th Cir. 1976); ***Sweet v. South Carolina Dept. of Corrections***, 529 F.2d 854, 865 (4th Cir. 1975). "'Cruel and unusual punishment,' as used in the Eighth Amendment,...does not draw its meaning simply from the type of punishment or deprivation imposed; it is often intimately concerned with the time covered by the punishment or deprivation and the reasonable limits of prison supervision." ***Sweet,*** 529 F.2d at 865. "[I]n considering the totality of conditions pertinent to the right of exercise at a given institution, elements including the overall duration of incarceration, the length of time for which prisoners are locked in their cells each day,... and the practical opportunities for the institution to provide prisoners with increased exercise opportunities must be considered." ***Dawson v. Kendrick***, 527 F. Supp. 1252, 1300 (S.D.W. Va. 1981). Thus, confinement or punishment conditions imposed under one set of circumstances may constitute an Eighth Amendment violation; yet the same conditions, imposed under different circumstances, would not.

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3 In this ruling we do not reach the issue, disputed by the parties, of whether the Eighth Amendment requires a showing of actual injury by a prisoner for success in a deprivation of exercise claim. Our denial of qualified immunity rests on other grounds.

By adopting a totality of the circumstances test, we have never held that denial of out-of-cell exercise opportunities is per se unconstitutional cruel and unusual punishment. However, our decisions at the time of the incidents in this case indicated that generally a prisoner should be permitted some regular out-of-cell exercise.[4] In ***Clay*** we stated, "[i]t is true that, in certain circumstances, restricting inmates' opportunities for physical exercise constitutes cruel and unusual punishment in violation of the Eighth Amendment." 626 F.2d at 347. And in ***Kirby*** we said that "[m]any...circumstances taken alone reach the level of cruel and unusual punishment, such as..inadequate exercise...." 530 F.2d at 587. See also *Sweet*, 529 F.2d at 866.

Other circuits' decisions correspond to our view on this issue. "it is generally recognized that a total or near-total deprivation of exercise or recreational opportunity, without penological justification, violates Eighth Amendment guarantees." ***Patterson v. Mintzes***, 717 F.2d 284, 289 (6th Cir. 1983); see ***Anderson v. Coughlin***, 757 F.2d 33, 35 (2d Cir. 1985)("some opportunity for exercise must be afforded to prisoners"); ***Ruiz v. Estelle***, 679 F.2d 1115, 1152 (5th Cir. 1982)("confinement of inmates for long periods of time without opportunity for regular physical exercise constitutes cruel and unusual punishment"); ***Spain v. Procunier***, 600 F.2d 189, 199 (9th Cir. 1979) ("denial of fresh air and regular outdoor exercise and recreation constitutes cruel and unusual punishment"); ***Rhem v. Malcom***, 371 F. Supp. 594, 627 (S.D.N.Y.), affirmed, 507 F.2d 333 (2d Cir. 1974)(the right of a

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4 We do not make a distinction here between indoor and outdoor exercise opportunities as have several courts. Since Mitchell was only permitted to exercise within his cell, we consider the adequacy of that opportunity for qualified immunity.

prisoner to exercise is "fundamental"); see also ***Campbell v. Cauthron***, 623 F.2d 503, 507 (8th Cir. 1980); ***Campbell v. McGruder***, 580 F.2d 521, 546 (D.C. Cir. 1978).

Although the cases in this area have generally established the constitutional necessity for some out-of-cell exercise, courts concede that penological considerations may, in certain circumstances, justify restriction. ***Patterson***, 717 F.2d at 289. The one court to specifically address justifications for exercise restrictions limited them to "unusual circumstances," or circumstances where "disciplinary needs made [outdoor exercise] impossible." ***Spain***, 600 F.2d at 199 (emphasis added). In that case, the court did not accept the state's justification that outdoor exercise was withheld to prevent attacks on prison staff and other inmates. It agreed on the necessity of segregating violent inmates from the population in general, but questioned why "other exercise arrangements were not made." Id. at 200. Further, it would not allow cost to excuse constitutional violations. Id. It seems proper to require a similar showing of infeasibility of alternatives, excepting financial justifications, before granting qualified immunity.

III.

Having set forth the applicable law as established by federal courts, we now consider the actions of the prison officials in this case. We find that, based on the ample case law, a reasonable prison official should have known that in most circumstances withholding all exercise opportunities from a prisoner over an extended period of time violates the Eighth Amendment. Yet Mitchell's unmanageable, violent nature may present exceptional circumstances here, justifying the deprivation. The facts on the record are inadequate for such a determination, and, therefore, we cannot grant prison officials qualified immunity based on the scant record before us.

Case law in existence prior to July 1983 makes apparent the view of this Circuit and the agreement among circuits that generally a prisoner must be provided some opportunity to exercise. These cases found either that prison officials provided exercise opportunities sufficient to meet "minimal constitutional requirements," ***Wilkerson v. Maggio***, 703 F.2d 909, 912 (5th Cir. 1983), or that, by not affording prisoners an opportunity to exercise, prison officials violated the Eighth Amendment. All cases, however, required some exercise opportunities be provided to inmates. Yet each of these decisions focused on the given facts and refused to issue a per se rule.

The appellate record before us provides little more than a description of the conditions of Mitchell's confinement. Mitchell was confined for extended periods of time, i.e. seven months and eleven months, without any opportunity for out-of-cell exercise. The length of his fully restricted confinement could have continued indefinitely, depending on the discretion of the Director's Classification Committee. Without additional evidence, these conditions could be said to violate our evolving constitutional standards of decency for prison confinement. Yet there are other factors surrounding the confinement that bear on our judgment of constitutionality.

Prison officials contend that even if regular exercise opportunities are constitutionally required for prisoners, their actions were not unconstitutional. They claim that Mitchell's incorrigibly assaultive nature necessitated the imposed restrictions. The officials further claim that the in-cell exercise manual provided Mitchell a meaningful substitute to out-of-cell exercise. This may be true. We are not penologists and, without more than the record before us, cannot properly judge the necessity or adequacy of appellants' actions. However, a mere assertion of necessity cannot relieve prison officials of Eighth Amendment

requirements. The Eighth Amendment protection from cruel and unusual punishment is provided specifically for convicted individuals. It is one of the few constitutional protections left intact for incarcerated individuals.[5] A detailed review of the feasibility of alternatives in this case, such as solitary out-of-cell exercise periods, or the adequacy of in-cell exercise would need to precede a grant of qualified immunity in a case such as this.

We do not decide by this opinion the constitutionality of a prison officials' actions here. That would be better accomplished by a trial judge after a full hearing on the facts.[6] We only decide that the evidence before us is not sufficient to determine qualified immunity.

In summary, we conclude that precedent from this and other circuits clearly establish that depriving inmates of all meaningful opportunities to exercise generally violates the Eighth Amendment prohibitions against cruel and unusual punishment.

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5 See *Turner v. Safley*, 482 U.S. 78, 87-88 (1987), where the Court rejects a strict scrutiny standard of review for violations of prisoners' constitutional rights (first amendment rights in this case). The Court, instead, required only that "a prison regulation that burdens fundamental rights [be] 'reasonably related' to legitimate penological objectives...." Id. at 87. In his dissent, Justice Stevens argued that this standard "would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between the concern and the challenged regulations." Id. at 100-01.

6 The most recent Supreme Court decision on Eighth Amendment violations mandates "inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." *Wilson v. Seiter*, 111 S. Ct. 2321, 2324 (1991). The Court requires that plaintiffs prove officials acted with "deliberate indifference" in order to show a constitutional violation. Id. at 2326.

Exceptions may be made under exigent circumstances that necessitate constriction of these rights. Because the record in this case does not adequately address all the issues necessary to determine whether prison officials violated clearly established law, we cannot grant qualified immunity at this time. We remand this case for further findings of fact in order to determine whether or not prison officials' conduct in this case constituted cruel and unusual punishment under the principles stated herein.

REMANDED WITH INSTRUCTIONS

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
February 28, 1992

No. 90-6040
CA-86-235-CRT

JAMES CALVIN MITCHELL

Plaintiff-Appellee

v.

NATHAN A. RICE; BOBBY R. WATSON;
BOB SEYMORE

Defendants - Appellants

and

JAMES MARTIN, Governor; J. DWIGHT
SANDERFORD; GENE T. COUSIN, in their
individual and official capacities

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellants filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Russell, with the concurrence of Judge Hall and Judge Phillips.

For the Court,

JOHN M. GREACEN
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-839

Nathan A.Rice, Bobby R. Watson and Bob Seymour,

Petitioners

v.

James Calvin Mitchell

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 27, 1992.

/S/ William H. Rehnquist
Chief Justice of the United States

Dated this 12th
day of May, 1992.

STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION DIVISION OF PRISONS	SUBJECT: ADMINISTRATIVE SEGREGATION	
POLICIES-PROCEDURES	TAB 5 NCAC 2C CLASSIFICATION	No. 0300

.0303 CONDITIONS OF CONFINEMENT

This policy establishes the specific conditions of confinement governing facilities housing inmates on administrative segregation (AS), protective custody (PC), disciplinary segregation (DS), and intensive management (IM). These conditions shall govern the operation at facilities designated for the above categories of offenders unless specifically excepted in writing by the Director of Prisons or his designee. The application of each standard is specified in the column marked "Application" on the left side of the page.

APPLICATION			
AS	PC	DS	IM
X	X	X	X
X	X	X	X
X		X	X
	X		

(a) SANITATION/PERSONAL HYGIENE

1. Acceptable sanitary standards shall be maintained by each inmate in each cell. Housing facilities shall be adequately eated, properly lighted, and adequately ventilated. Each inmate shall be required to keep his cell area neat and clean. Necessary cleaning materials shall be furnished by supervisory staff for this purpose and controlled accordingly.

2. Assigned inmates shall maintain acceptable standards of personal hygiene. All inmates without funds shall be issued necessary personal hygiene items and the cost absorbed through the canteen imprest fund.

(b) MEALS

1. Inmates assigned to administrative, disciplinary segregation, or intensive management shall receive meals in their cells.

2 . Inmates assigned to protective custody may be permitted to receive meals outside the cell if proper security can be maintained in the protective custody facility.

Distribution:

Issued By: DIR. DOP	Approved by: Sec. of Correction	Date Issued	Supersedes Issue Dated	2C-12

STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION DIVISION OF PRISONS	SUBJECT: ADMINISTRATIVE SEGREGATION	
POLICIES-PROCEDURES	TAB 5 NCAC 2C CLASSIFICATION	No. 0300

APPLICATION			
AS	PC	DS	IM
X	X	X	X
X	X	X	X
X	X	X	X

(c) SHOWER/EXERCISE PERIODS

1. Unless specifically restricted under the provisions of this policy, assigned inmates shall be provided a daily opportunity to shower and exercise outside the cell for a period of one (1) hour. This action or the refusal to shower and exercise shall be documented on the DC-141.

2. After serving a maximum of fifteen (15) days in one of the specified categories of confinement, assigned inmates shall be provided, except during periods of inclement weather access to outside exercise yards for not less than two (2) exercise periods each week, subject to any exception which may be granted by the Director ofo Prisons or his designee under the provisions of Section C(3) or D(1) below.

3. The Director of Prisons, or his designee, may grant, in writing, an exception to the requirement that inmates have a daily opportunity to shower and exercise. Exceptions shall be granted for a definite time period and, in general, shall be in response to institution or unit special needs and contingencies which may include, but are not liited to, prison emergencies, natural disasters, loss or curtailment of the unit facilities as the result of construction projects such as renovation of structures or erection of new facilities, and the like. In an emergency, these requirements may be suspended by the unit or institution head pending notification of and instructions from the Director of Prisons or his designee.

Except in emergencies, the Director of Prisons or his designee will not curtail shower and exercise periods to less than twice per week for assigned inmates.

Distribution:

Issued By: DIR. DOP	Approved by: Sec. of Correction	Date Issued	Supersedes Issue Dated	2C-13

STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION DIVISION OF PRISONS	SUBJECT: ADMINISTRATIVE SEGREGATION	
POLICIES-PROCEDURES	TAB 5 NCAC 2C CLASSIFICATION	No. 0300

APPLICATION			
AS	PC	DS	IM
X	X	X	X
X	X	X	X
X	X	X	X

4. An inmate may reject shower and exercise by refusal to comply with necessary security procedures, or threatening actions which present an immediate danger to the safety of staff or other inmates if the inmate were allowed outside the cell. Restriction of the inmate to the cell may be considered if the inmate's behavior presents a clear and present danger after the shower and exercise has been attempted outside the cell with the use of restraints. Refusal of exercise should be documented on the DC-141.

(d) PROCEDURE TO RESTRICT OUTSIDE CELL ACTIVITIES

1. In any instance where an inmate has seriously assaulted or threatened to assault staff or other inmates if allowed outside the cell, such action shall be documented and additional structured limits shall be imposed on outside cell activities for that inmate. The inmate shall be required to shower and exercise in security restraints (handcuffs and/or leg cuffs). If the use of restraints fails to resolve the threatening and dangerous behavior, the following classification procedures shall be followed:

(A) A DC-121A shall be prepared with a thoroughly documented presentation of the instances supporting the clear and present danger of the inmate's behavior supporting the imposition

APPLICATION			
AS	PC	DS	IM
X	X	X	X

of additional restrictions. In conjunction with this, consideration shall be given as to whether the inmate poses a threat to the law library facility or its staff. If such is found to exist, the DC-121 shall include the request that the inmate also be reviewed foro curtailment of law library privileges, and notified that such will considered by the Director's Review Sub-committee, as required by and in accordance with 5 NCAC 2G .0203, Subsection (e).

(B) A Director's ReviewSub-committee shall be immediately contacted, and a hearing for the inmate will be held within three (3) working days. Outside cell activities shall be restricted pending the hearing. Working days are Monday through Friday, exclusive of holidays.

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Issued By:	Approved by:	Date Issued	Supersedes Issue	
DIR. DOP	Sec. of Correction		Dated	2C-13.1

STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION DIVISION OF PRISONS	SUBJECT: ADMINISTRATIVE SEGREGATION	
POLICIES-PROCEDURES	TAB 5 NCAC 2C CLASSIFICATION	No. 0300

APPLICATION			
AS	PC	DS	IM
X	X	X	X
X	X	X	X
X	X	X	X
X	X	X	X

(C) The inmate shall be provided with advance written notice (DC-123) of the hearing to consider additional restrictions.

(D) If additional restrictions are approved by the Director's Review Sub-committee, the DC-121A shall be hand—carried to each of the Director's Review Committee members for final action on the following working day.

(E) In any case where the Director's Review Committee has finally approved the imposition of additional restrictions on outside cell exercise activities, each inmate shall be advised of specific alternate exercise programs.

(F) Shower and exercise restrictions imposed by the Director's Review Committee shall be reviewed at 30-day intervals by the Director's Review Committee (DC-121). Authority to remove restrictions shall be vested with the Director's Review Sub-committee. Review of law library privilege curtailment recommendations will be in accordance with 5 NCAC 2G .0203(e).

APPLICATION

AS	PC	DS	IM
X	X		X
		X	

(e) TRUST FUND WITHDRAWALS

1. Assigned inmates may draw up to $20 per week from the Inmate Trust Fund unless assigned to disciplinary segregation.

2. Inmates in disciplinary segregation may withdraw trust funds of no more than $10 to purchase stamps, personal hygiene items, and tobacco products. Withdrawals for any other purpose must be approved by the institution head or unit superintendent.

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Issued By:	Approved by:	Date Issued	Supersedes Issue	
DIR. DOP	Sec. of Correction		Dated	2C-13.2

STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION DIVISION OF PRISONS	SUBJECT: ADMINISTRATIVE SEGREGATION	
POLICIES-PROCEDURES	TAB 5 NCAC 2C CLASSIFICATION	No. 0300

APPLICATION

AS	PC	DS	IM
X	X	X	X
		X	
X	X	X	X
X	X	X	X

(f) CANTEEN ORDERS

1. Assigned inmates will be permitted to have canteen orders filled not less than three (3) times per week.

2. Inmates assigned to disciplinary segregation will not be permitted to have canteen orders filled except for stamps, esential personal hygiene items, and tobacco products.

(g) READING MATERIALS

1. Assigned inmates may have books and magazines consistent with limitations imposed by departmental policy (2d .0100). Under no circumstances will inmates be allowed to accumulate materials constituting a health, fire, or security hazard.

(h) TOBACCO PRODUCTS

1. Inmates will be permitted to retain and use tobacco products provided their use poses no threat to the security or safety of the facility. If this privilege is suspended, the officer will document the reason for this action on the DC-141.

APPLICATION

AS	PC	DS	IM
	X		
X	X	X	X
	X		

(i) TELEVISION PRIVILEGES

1. Inmates assigned to protective custody will be permitted television privileges daily (Monday through Friday) from 5:00 p.m. to 10:00 p.m. Saturdays, Sundays, and holidays television privileges will be from 1:00 p.m. through 10:00 p.m. Special permission may be granted to extend television hours by the officer in charge of the unit or institution.

2. Inmates assigned to administrative segregation, disciplinary segregation, and intensive management will not be authorized television privileges. Special exceptions for long-term intensive management facilities shall be approved by the Director of Prisons or his designee.

3. Television privileges in protective custody facilities may be suspended without prior notice by the officer in charge of the unit or institution, if necessary, to maintain order and security. If such action is taken the officer in charge will document the reasons for this action on the daily log.

Distribution:

Issued By:	Approved by:	Date Issued	Supersedes I ssue	
DIR. DOP	Sec. of Correction		Dated	2C-13.3

STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION DIVISION OF PRISONS	SUBJECT: ADMINISTRATIVE SEGREGATION	
POLICIES-PROCEDURES	TAB 5 NCAC 2C CLASSIFICATION	No. 0300

APPLICATION

AS	PC	DS	IM
X	X		X
		X	
X	X		X
X	X	X	X

(j) RADIOS

1. Assigned inmates will be permitted to use personal radios with an earplug only. No inmate shall be allowed to have in his possession more batteries than required to operate the radio.

2. Inmates assigned to disciplinary segregation will not be allowed to possess radios.

3. Radios may be confiscated without prior notice by the officer in charge of the unit or institution, if necessary, to maintain order and security. When such action is taken, it will be documented on the DC-141 by the officer in charge of the unit and recorded on the inmate's personal property inventory (DC-160).

(k) MAIL

1. Consistent with the conditions of confinement and custody classification, inmates assigned shall have the same mail privileges as inmates in the regular population.

APPLICATION

AS	PC	DS	IM
X	X	X	X
	X		

(l) TELEPHONE PRIVILEGES

1. Assigned inmates will not be permitted to have telephone privileges. Except in the case of valid emergency requiring the use of a telephone, telephone privileges will be strictly limited.

(m) VISITS

1. Inmates assigned to protective custody will generally be permitted to have contact visiting privileges consistent with custody and security considerations. Visists shall be conducted only in prescribed visiting areas.

Distribution:

Issued By: DIR. DOP	Approved by: Sec. of Correction	Date Issued	Supersedes I ssue Dated	2C-13.4

STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION DIVISION OF PRISONS	SUBJECT: ADMINISTRATIVE SEGREGATION	
POLICIES-PROCEDURES	TAB 5 NCAC 2C CLASSIFICATION	No. 0300

APPLICATION

AS	PC	DS	IM
X		X	X
X	X	X	X
X	X	X	X
X	X	X	X

2. Inmates in administrative or disciplinary segregation, or intensive management will normally visit in the noncontact visiting area.

3. Visiting schedules for assigned inmates shall be on an appointment basis between the hours of 9:00 a.m. and 3:00 p.m. Monday through Friday. No visiting privileges shall be allowed on legal holidays. Visits will be limited to a maximum duration of one (1) hour per visit. The officer in charge of the unit may alter the visiting time and the number of visits to insure proper order and security.

(n) USE OF RESTRAINTS - INTERNAL MOVEMENT

1. Supervisory staff are expected to employ restraints, if required, for the internal movement and proper management of assigned inmates to insure the safety of correctional staff and inmates.

2. Except as otherwise provided by policy, inmates assigned to protective custody shall be showered and exercised without restraints in controllable groups or individually under the appropriate staff supervision. If an inmate's current or prior behavior warrants the use of restraints, this action shall be documented on the DC-141.

APPLICATION			
AS	PC	DS	IM
X	X	X	X
X	X	X	X

(O) ACCESS TO HEALTH CARE

1. Inmates shall have access to health care similar to inmates housed in the regular population.

2. Inmates requesting to be seen by the health provider during regularly scheduled sick call shall make this request known to the officer in charge. Each inmate requesting to be seen shall be evaluated by the health provider conducting daily sick call.

Distribution:

Issued By:	Approved by:	Date Issued	Supersedes Issue	
DIR. DOP	Sec. of Correction		Dated	2C-13.5

STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION DIVISION OF PRISONS	SUBJECT: ADMINISTRATIVE SEGREGATION	
POLICIES-PROCEDURES	TAB 5 NCAC 2C CLASSIFICATION	No. 0300

APPLICATION

AS	PC	DS	IM
X	X	X	X
X	X	X	X

3. The health provider conducting sick call shall evaluate each inmate's complaint at his cell and treat or refer the case as appropriate. The results of sick call visits shall be recorded in the individual out-patient health record and on the DC-141. If the inmate refuses medical care, document same on the DD-141.

(p) WORK ASSIGNMENTS

1. Wherever appropriate and consistent with custody and security considerations, inmates assigned to administrative segregation and protective custody may be required to perform structured work assignments.

History Note: Statutory Authority
G.S. 148-11; Eff. Feb. 1, 1976;
Amended Eff. Nov. 1, 1976
Amended Eff. Feb. 6, 1981.

Distribution:

Issued By: DIR. DOP	Approved by: Sec. of Correction	Date Issued	Supersedes Issue Dated	2C-13.6

SECTION .0300 - ADMINISTRATIVE SEGREGATION

.0301 GENERAL

Administrative segregation is the temporary removal of an inmate from a general inmate population to confinement in a secure area. Administrative segregation is authorized pending initial processing, including identification and reception of records, and as follows:

(1) to protect staff and other inmates from the threat of harm by the inmate;
(2) to protect the inmate involved from self injury or threat of harm by others;
(3) to minimize the risk of escape by the inmate or others influenced by his actions;
(4) to preserve order where other methods of control have failed.

History Note: *Statutory Authority G.S. 148-11; 148-36;*
Eff. February 1, 1976;
Amended Eff. December 1, 1984; September 29, 1978.

.0302 PROCEDURE

(a) Inmates may be segregated for 48 hours or less at the discretion of the officer in charge as a "cooling off" measure. The reasons for the action will be documented on Form DC-139 and placed in the inmate's unit jacket, following release from segregation. Where disciplinary action is pending the unit superintendent may approve administrative segregation in accordance with 5 NCAC 2B .0200. No inmate may be placed in administrative segregation for more than 48 hours without the verbal approval of the area administrator or institution administrator and documentation on the DC-139.

(b) Inmates may be segregated for a period not to exceed 15 days with the verbal approval of the area administrator or institution administrator. The date of approval should be documented on the DC-139.

(c) In cases where an inmate is confined to administrative segregation for a period greater than 15 days, segregated inmates should be reviewed before an area or institutional classification committee. The inmate should receive written notice on Form DC-123 of the reasons that he is being considered for administrative segregation at least 24 hours before the review is held.

(d) The committee shall consist of at least three members, one of which must be a member of the programs staff. At the review, the inmate will be informed of the reasons why he is being held in administrative segregation and will be given an opportunity to speak in his own behalf about any matter relevant to his classification status. If the committee determines that continued segregated confinement is appropriate, it will note its findings on an approved classification form. All committee decisions must be approved by the area administrator/institution administrator or designated representative.

(e) No inmate should be confined in administrative segregation more than 60 days without the authorization of a Director's Classification Committee.

History Note: *Statutory Authority G.S. 148-11;*
Eff. February 1, 1976;
Amended Eff. December 1, 1984; September 29, 1978; November 1, 1976.

.0303 CONDITIONS OF CONFINEMENT

This policy establishes the specific conditions of confinement governing facilities housing inmates on administrative segregation (AS), protective custody (PC), disciplinary segregation

govern the operation at facilities designated for the categories in this Rule of offenders unless specifically excepted in writing by the Director of Prisons or his designee. The application of each standard is specified in the column marked "Application" on the left side of the page.

(1) Sanitation/Personal Hygiene

(a) Acceptable sanitary standards shall be maintained by each inmate in each cell. Housing facilities shall be adequately heated, properly lighted, and adequately ventilated. Each inmate shall be required to keep his cell area neat and clean. Necessary cleaning materials shall be furnished by supervisory staff for this purpose and controlled accordingly.

(b) Assigned inmates shall be issued necessary personal hygiene items and the cost absorbed through the canteen imprest fund.

(2) Meals

(a) Inmates assigned to administrative, disciplinary segregation, or maximum custody shall receive meals in their cells.

(b) Inmates assigned to protective custody may be permitted to receive meals outside the cell if proper security can be maintained in the protective custody facility.

(3) Shower/Exercise Periods

(a) Unless specifically restricted under the provisions of this policy, assigned inmates shall be provided a daily opportunity to shower and exercise outside the cell for a period of one hour. This action or the refusal to shower and exercise shall be documented on the DC-141.

(b) After serving a maximum of 15 days in one of the specified categories of confinement, assigned inmates shall be provided, except during periods of inclement weather, access

to outside exercise yards for not less than two exercise periods each week, subject to any exception which may be granted by the Director of Prisons or his designee under the provisions of Subparagraph (3)(c) or (4) of this Rule.

(c) The Director of Prisons, or his designee, may grant, in writing, an exception to the requirement that inmates have a daily opportunity to shower and exercise. Exceptions shall be granted for a definite time period and, in general, shall be in response to institution or unit special needs and contingencies which may include, but are not limited to, prison emergencies, natural disasters, loss or curtailment of the unit facilities as the result of construction projects such as renovation of structures or erection of new facilities, and the like. In an emergency, these requirements may be suspended by the unit or institution head pending notification of and instructions from the Director of Prisons or his designee. Except in emergencies, the Director of Prisons or his designee will not curtail shower and exercise periods to less than twice per week for assigned inmates.

(d) An inmate may reject shower and exercise by refusal to comply with necessary security procedures, or threatening actions which present an immediate danger to the safety of staff or other inmates if the inmate were allowed outside the cell. Restriction of the inmate to the cell may be considered if the inmate's behavior presents a clear and present danger after the shower and exercise has been attempted outside the cell with the use of restraints. Refusal of exercise should be documented on a DC-141.

(4) Procedure to Restrict Outside Cell Activities. In any instance where an inmate has seriously assaulted or threatened to assault staff or other inmates if allowed outside the cell, such action shall be documented and additional structured limits shall be imposed on outside cell activities for that inmate. The inmate shall be required to shower and exercise in security restraints (handcuffs and/or leg cuffs). If the use of restraints fails to resolve the threatening and dangerous be-

havior, the following classification procedures shall be followed:

(a) A DC-121A shall be prepared with a thoroughly documented presentation of the instances supporting the clear and present danger of the inmate's behavior supporting the imposition of additional restrictions. In conjunction with this, consideration shall be given as to whether the inmate poses a threat to the law library facility or its staff. If such is found to exist, the DC-121 shall include the request that the inmate also be reviewed for curtailment of law library privileges, and notified that such will be considered by the Director's Classification Committee, as required by and in accordance with 5 NCAC 2G .0203, Paragraph (5).

(b) A Director's Classification Committee shall be immediately contacted, and a hearing for the inmate will be held within three working days. Outside cell activities shall be restricted pending the hearing. Working days are Monday through Friday, exclusive of holidays.

(c) The inmate shall be provided with advance written notice (DC-123) of the hearing to consider additional restrictions.

(d) If additional restrictions are approved by the Director's Classification Committee, the DC-121A should show documentation of the action taken.

(e) In any case where the Director's Classification Committee has finally approved the imposition of additional restrictions on outside cell exercise activities, each inmate shall be advised of specific alternate exercise programs.

(f) Shower and exercise restrictions imposed by the Director's Classification Committee shall be reviewed at 30-day intervals by the Director's Classification Committee (DC-121). Authority to remove restrictions shall be vested with the Director's Classification Committee. Review of law library privilege curtailment recommendations will be in accordance with 5 NCAC 2G .0203(e).

(5) Trust Fund Withdrawals

(a) Assigned inmates may draw up to thirty dollars ($30.00) per week from the Inmate Trust Fund unless assigned to disciplinary segregation.

(b) Inmates in disciplinary segregation may withdraw trust funds of no more than ten dollars ($10.00) to purchase stamps, personal hygiene items, and tobacco products. Withdrawals for any other purpose must be approved by the institution head or unit superintendent.

(6) Canteen Orders

(a) Assigned inmates will be permitted to have canteen orders filled not less than three times per week.

(b) Inmates assigned to disciplinary segregation will not be permitted to have canteen orders filled except for stamps, essential personal hygiene items, and tobacco products.

(7) Reading Materials. Assigned inmates may have books and magazines consistent with limitations imposed by departmental policy (2D .0100). Under no circumstances will inmates be allowed to accumulate materials constituting a health, fire, or security hazard.

(8) Tobacco Products. Inmates will be permitted to retain and use tobacco products provided their use poses no threat to the security or safety of the facility. If this privilege is suspended, the officer will document the reason for this action on the DC-141.

(9) Television Privileges

(a) Inmates assigned to protective custody will be permitted television privileges daily (Monday through Friday) from 5:00 p.m. to 10:00 p.m. Saturdays, Sundays, and holidays television privileges will be from 1:00 p.m. to 10:00 p.m. Special permission may be granted to extend television hours by the officer in charge of the unit or institution.

(b) Inmates assigned to administrative segregation, disciplinary segregation, and maximum custody will not be authorized television privileges. Special exceptions for long-term maximum custody facilities shall be approved by the Director of Prisons or his designee.

(c) Television privileges in protective custody facilities may be suspended without prior notice by the officer in charge of the unit or institution, if necessary, to maintain order and security. If such action is taken, the officer in charge will document the reasons for this action on the daily log.

(10) Radios

(a) Assigned inmates will be permitted to use personal radios with an earplug only. No inmate shall be allowed to have in his possession more batteries than required to operate the radio.

(b) Inmates in disciplinary segregation will not be allowed to possess radios.

(c) Radios may be confiscated without prior notice by the officer in charge of the unit or institution, if necessary, to maintain order and security. When such action is taken, it will be documented on the DC-141 by the officer in charge of the unit and recorded on the inmate's personal property inventory (DC-160).

(11) Mail. Consistent with the conditions of confinement and custody classification, inmates assigned shall have the same mail privileges as inmates in the regular population.

(12) Telephone privileges. Assigned inmates will not be permitted to have telephone privileges. Except in the case of valid emergency requiring the use of a telephone, telephone privileges will be strictly limited.

(13) Visits

(a) Inmates assigned to protective custody will generally be permitted to have contact visiting privileges consistent with custody and security considerations. Visits shall be conducted only in prescribed visiting areas.

(b) Inmates in administrative or disciplinary segregation, or maximum custody will normally visit in the noncontact visiting area.

(c) Visiting schedules for assigned inmates shall be on an appointment basis between the hours of 9:00 a.m. and 3:00 p.m. Monday through Friday. No visiting privileges shall be allowed on legal holidays. Visits will be limited to a maximum duration of one hour per visit. The officer in charge of the unit may alter the visiting time and the number of visits to insure proper order and security.

(14) Use of Restraints - Internal Movement

(a) Supervisory staff are expected to employ restraints, if required, for the internal movement and proper management of assigned inmates to insure the safety of correctional staff and inmates.

(b) Except as otherwise provided by policy, inmates assigned to protective custody shall be showered and exercised without restraints in controllable groups or individually under the appropriate staff supervision. If an inmate's current or prior behavior warrants the use of restraints, this action shall be documented on the DC-141.

(15) Access to Health Care

(a) Inmates shall have access to health care similar to inmates housed in the regular population.

(b) Inmates requesting to be seen by the health provider during regularly scheduled sick call shall make this request known to the officer in charge. Each inmate requesting to be seen shall be evaluated by the health provider conducting daily sick call.

(c) The health provider conducting sick call shall evaluate each inmate's complaint at his cell and treat or refer the case as appropriate. The results of sick call visits shall be recorded in the individual out-patient health record and on the DC-141. If the inmate refuses medical care, document same on the DC-141.

(16) Work assignments. Wherever appropriate and consistent with custody and security consideration, inmates assigned to administrative segregation and protective custody may be required to perform structured work assignments.

History Note: *Statutory Authority G.S. 148-11;*
Eff. February 1, 9176;
Amended Eff. December 1, 1984; February 6, 1981;
September 29, 1978; November 1, 1976.

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No. 91-2082

In The

Supreme Court of the United States

October Term, 1992

NATHAN A. RICE, BOBBY R. WATSON and BOB SEYMOUR,

Petitioners,

v.

JAMES CALVIN MITCHELL,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent James Calvin Mitchell respectfully submits that a writ of certiorari to review the opinion of the United States Court of Appeals for the Fourth Circuit in *Mitchell v. Rice*, 954 F.2d 187 (4th Cir. 1992), is unnecessary and should not issue.

STATEMENT OF THE CASE AND FACTS

Petitioners devote most of their Statement of the Case to a summary of Respondent's poor disciplinary record.

Their purpose is to obscure the nature of the punishment meted out by the Petitioners to obtain an "improvement" of Respondent's behavior. Petitioners' response to these discipline problems was to confine Respondent to his cell, on a twenty-hour per day basis, for two extended periods of time. The first such confinement was for seven months. The second was for thirteen months. Respondent was permitted to leave his cell only to shower twice each week, and then in full chain restraints. He had no opportunity for any out-of-cell exercise or recreation during this nearly two year period.

It was this deprivation which forms the basis for Respondent's Eighth Amendment claim. The Petitioners contended that they were entitled to qualified immunity on Respondent's claim because it was not clearly established that such confinement was unconstitutional. The District Court and the Fourth Circuit rejected this argument.

REASONS FOR DENYING CERTIORARI

I. THE FOURTH CIRCUIT APPLIED A TRADITIONAL QUALIFIED IMMUNITY ANALYSIS WHICH DOES NOT WARRANT REVIEW BY THIS COURT.

The Petitioners see demons where there are none. Their application for certiorari is based upon the assertion that the Fourth Circuit's opinion has "in effect eliminate[d] qualified immunity." Pet. at 11. That is hardly the case. This strained interpretation is based on the Fourth Circuit's passing reference, in a footnote, to this Court's

recent opinion in *Wilson v. Seiter*, 111 S.Ct. 2321 (1991). *Mitchell v. Rice*, 954 F.2d 187, 193 n.6 (4th Cir. 1992). The Court of Appeals referred to *Wilson* to underscore that it was not ruling on the merits of Respondent's claim, but that it was limiting its decision to whether the right that Petitioners violated was clearly delineated for qualified immunity purposes. *Wilson* was cited for its admonition that there must be an inquiry into the state of mind of the actors accused of the constitutional violation before an Eighth Amendment violation can be found.

The Petitioners have a very different view of the Fourth Circuit's footnote. They interpret it as creating an "alternative theory of liability" for prisoners to raise which Petitioners say will effectively bypass the qualified immunity defense. Their position appears to be that the Fourth Circuit's holding means that since an Eighth Amendment claimant must establish a culpable state of mind, that culpability will always be a question of fact and summary judgment will never be appropriate.

It is the Petitioners, and not the Fourth Circuit, who have blurred the distinction between qualified immunity and the questions of fact surrounding any resolution on the merits. The only question at this stage, under *Anderson v. Creighton*, 483 U.S. 635 (1987), was whether "[t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. The issue under *Anderson* is not whether the Defendant's conduct was unconstitutional. The Court engaged in a thorough review of its precedent regarding a prisoner's right to out-of-cell exercise opportunities, and properly concluded that this right was sufficiently clear that it could

not grant summary judgment on Petitioners' claims of qualified immunity.

The immunity accorded prison officials is only a qualified one. Petitioners may wish for more, but the objective test of *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), was properly applied here, and the Petitioners could not establish their entitlement to qualified immunity. This was their burden. *See, e.g., Dellums v. Powell*, 566 F.2d 167, 176 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Skehan v. Board of Trustees*, 538 F.2d 53, 61 (3d Cir.), *cert. denied*, 429 U.S. 979 (1976). Cf. *Clark v. Link*, 855 F.2d 156, 160-61 (4th Cir. 1988) (burden "appears" to rest on claimant). Petitioners' claim that the Fourth Circuit "grafted" the subjective standard of *Wilson* onto the objective standard of *Harlow*, and that the Court gave the Respondent a "sword" meant to be only a "shield", is based upon a misreading of the holding of the Court. It was true to the principles of *Harlow*. But, if indeed the Fourth Circuit inquired into the subjective motivation in making its ruling, that was appropriate. As virtually every Court of Appeals has recognized, it is often impossible to keep *Harlow* entirely on its objective underpinnings. *See, e.g., Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 648 (10th Cir. 1988) (where subjective intent is an underlying element of the tort, *Harlow* did not exclude an inquiry into the intent of the defendants); *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1432 (D.C. Cir. 1987) (rejecting defendants' claim that, under *Harlow*, state of mind was never relevant, referring to this as "a fault or vulnerability in the current law of qualified immunity."); *Kenyatta v. Moore*, 744 F.2d 1179, 1185 (5th Cir. 1984) (Supreme Court has "not

entirely eliminate[d] subjective inquiry from every qualified immunity analysis."), *cert. denied*, 471 U.S. 1066 (1985).

To the extent that Petitioners suggest that the *Mitchell* decision is in conflict with the Ninth Circuit's decision in *McKinney v. Anderson*, 959 F.2d 853 (9th Cir. 1992), they are wrong. There was no qualified immunity issue raised in *McKinney*. The holding of that case ultimately stands for the same proposition as the footnote in *Mitchell* – that a prisoner making an Eighth Amendment claim must, at some stage, establish the state of mind of the person violating his rights. *Id.* at 854. This is an inquiry separate from that of qualified immunity, and one to be made after the qualified immunity issue is resolved. That is the issue which should now be addressed by the district court, and which is not now before this Court.

II. THIS IS NOT A CASE WHERE *TURNER v. SAFLEY* SHOULD HAVE BEEN APPLIED.

There are North Carolina prison regulations that set out the steps prison officials must take before depriving an inmate of out-of-cell exercise opportunities. Petitioners now claim that since they acted pursuant to regulation, it is the regulation itself, not their conduct, which is at issue. They contend that the Court should have applied the four-prong test of *Turner v. Safley*, 482 U.S. 78, 89-90 (1987). *The Supreme Court has never applied Turner to an Eighth Amendment case. See Jordon v. Gardner*, 953 F.2d 1137 (9th Cir. 1992) (applying *Turner* to First Amendment claim but not Fourth Amendment or Eight Amendment

claims). As Judge (now Justice) Kennedy wrote in *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979):

> it must . . . be remembered that enforcement of the eighth amendment is not always consistent with allowing complete deference to all administrative determinations by prison officials. Whatever rights one may lose at the prison gates, the full protections of the eighth amendment most certainly remain in force. The whole point of the amendment is to protect persons convicted of crimes. Eighth amendment protections are not forfeited by one's prior acts. Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary.

Id. at 193-94 (citations omitted).

The North Carolina prison regulations in question provide that inmates in maximum custody are entitled to outside exercise at least twice a week. N.C. Admin. Code tit.5 r.2C.0303(3)(b) (Oct. 1991). The regulations explicitly provide that if it is necessary to restrict out-of-cell activity because of an inmate's assaultive behavior, the prisoner shall be allowed to exercise in security restraints. *Id.* at r.2C.0303(4). If further restriction is necessary, the inmate shall be "advised of specific alternate exercise programs." *Id.* at r.2C.0303(4)(e). And if such drastic restrictions are imposed, they are to be reviewed at 30-day intervals. *Id.* at r.2C.0303(4)(f). *There is no evidence in the record that Mitchell was ever advised of alternate exercise*

programs or that his severe punishment was reviewed at the appropriate times.[1]

In its present posture, this case is not about those regulations. There are genuine issues of material fact whether Petitioners complied with them. The issues raised at this stage concern the Respondent's conditions of confinement and whether they violated a "clearly established right" for qualified immunity purposes.

If Petitioners wish to raise the defense that they acted pursuant to prison regulations or to put into play the constitutionality of those regulations, they are entitled to do that in the appropriate forum. Respondent has not contended that these regulations are unconstitutional. All that is before this Court is the issue of qualified immunity.

III. THE RIGHT TO OUT-OF-CELL EXERCISE OF AT LEAST SOME MINIMAL DEGREE WAS SUFFICIENTLY WELL ESTABLISHED.

Petitioners' final argument is that Mitchell's right to out of cell recreation was not sufficiently clear at the time for them to anticipate that their complete deprivation of

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[1] Federal prison regulations protect exercise privileges with equal care. Inmates are specifically guaranteed the right to exercise. 28 C.F.R. § 541.12. (1991) Prison disciplinary committees may revoke exercise privileges, but oniy for a specified period of time. *Id.* at § 541.13. Such a withdrawal may not exceed a period of one week. *Id.* at § 541.22(6). Inmates in a "control unit program" (those who have injured or threatened others) are guaranteed "a minimum of seven hours weekly recreation and exercise out of the cell." *Id.* at § 541.46(e)(1).

this right might entitle him to damages. If this were so, Petitioners would have been entitled to qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987).

The Fourth Circuit properly held, however, that this right was sufficiently clear. The federal courts have long emphasized the importance of allowing even the most dangerous prisoners some brief relief from their cells to exercise and recreate. *See, e.g., Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979). The law in the Fourth Circuit counselled strongly against complete deprivations of exercise opportunities. *See, e.g., Clay v. Miller*, 626 F.2d 345, 346 (4th Cir. 1980) ("[I]n certain circumstances, restricting inmates' opportunities for physical exercise constitutes cruel and unusual punishment in violation of the Eighth Amendment."); *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976) ("Many of the circumstances taken alone reach the level of cruel and unusual punishment, such as . . . inadequate exercise . . . . "); *Sweet v. South Carolina Department of Corrections*, 529 F.2d 854, 866 (4th Cir. 1975) (*en banc*) ("[I]ndefinite limitation on exercise may be harmful to a prisoner's health, and, if so, would amount to 'cruel and unusual' punishment.").

The Petitioners were on notice that they were treading in an area of constitutional significance. If the issue in this case had been whether a set period of exercise, of a set frequency, was constitutionally permissible, perhaps qualified immunity would be appropriate. Here, however, there was no exercise at all allowed. No court has ever held that the total deprivation of exercise for such long periods of time is constitutionally permissible.

Qualified immunity therefore was not appropriate here. There is no reason for the Supreme Court to disturb this aspect of the Court of Appeals' ruling.

CONCLUSION

This case presents none of the "special and important" reasons justifying a grant of a writ of certiorari. Respondent respectfully requests that the Petition be denied.

Respectfully submitted this the 24th day of July 1992.

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BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, DELAWARE, FLORIDA, HAWAII, INDIANA, KANSAS, MAINE, MARYLAND, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WEST VIRGINIA AND WYOMING, THE COMMONWEALTH OF PUERTO RICO AND THE TERRITORY OF GUAM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Fourth Circuit held that prison officials are not entitled to qualified immunity for denying out-of-cell exercise privileges to a violently assaultive, maximum security inmate after less restrictive measures to control the inmate had repeatedly failed. This case presents these questions:

1. How does the objective qualified immunity test of legal reasonableness apply when constitutional rights containing a subjective state of mind element are allegedly violated?

2. Does the Fourth Circuit's refusal to grant qualified immunity to prison officials who exercised their discretion to revoke an extremely violent prisoner's out-of-cell exercise privileges conflict with applicable

qualified immunity and Eighth Amendment decisions of this Court?

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No. 91-2082

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NATHAN A. RICE, BOBBY R. WATSON AND BOB SEYMOUR,

Petitioners,

v.

JAMES CALVIN MITCHELL,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, DELAWARE, FLORIDA, HAWAII, INDIANA, KANSAS, MAINE, MARYLAND, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WEST VIRGINIA AND WYOMING, THE COMMON WEALTH OF PUERTO RICO AND THE TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Sup.Ct.R. 37, amici curiae respectfully submit this brief in support of Petitioners.

INTEREST OF AMICI CURIAE AND INTRODUCTORY STATEMENT

This case, which arises out of prison officials' denial of out-of-cell exercise privileges to an incorrigibly violent inmate, presents this Court with the opportunity to define for the first time the scope of the qualified immunity defense in the context of an alleged Eighth Amendment violation, and to address the currently unresolved but important issue of how the objective test of legal reasonableness applies when the acts complained of affect constitutional rights in which the officials' state of mind is a substantive element.

The qualified immunity claim in this case hinges on whether denying out-of-cell exercise privileges to an unpredictably assaultive prisoner violates clearly established law, which

prohibits the officials who took these actions from doing so with deliberate indifference. This Court has not decided, however, how the qualified immunity test of objective legal reasonableness applies to government action that allegedly violates a constitutional right containing a subjective state of mind component. This Court should review the Fourth Circuit's decision and establish the standards that the lower courts are to apply when such a right is at issue.

In refusing to decide whether the prison officials in this case are entitled to qualified immunity, and holding instead that the qualified immunity test requires that the officials first be subject to trial to determine their mental state, the Fourth Circuit has fashioned a rule that strips

prison administrators of any meaningful immunity from suit and fully exposes them to substantial adverse social costs. This case warrants review because the decision below is an unprecedented expansion of the Eighth Amendment at the expense of effective and efficient government.

REASONS FOR GRANTING REVIEW

I. THIS CASE PRESENTS THE IMPORTANT QUESTION OF FIRST IMPRESSION OF HOW THE QUALIFIED IMMUNITY TEST OF OBJECTIVE LEGAL REASONABLENESS APPLIES WHEN CONSTITUTIONAL RIGHTS THAT CONTAIN A SUBJECTIVE COMPONENT ARE ALLEGEDLY VIOLATED.

This case presents "an important question of federal law which has not been, but should be, settled by this Court." Sup.Ct.R. 10.1(c). That issue is how the objective qualified immunity test of legal reasonableness set forth in Harlow v. Fitzgerald, 457 U.S. 800 (1982), applies when the allegedly

violated constitutional right contains a substantive subjective element.

The Fourth Circuit correctly observed that a determination of whether the prison officials in this case acted with deliberate indifference and inflicted cruel and unusual punishment requires an inquiry into the officials' state of mind. (App. at 125), citing Wilson v. Seiter, 111 S.Ct. 2321, 2324, 2326 (1991). But this Court in Harlow rejected the inquiry into state of mind that its earlier qualified immunity decisions called for, see, e.g., Wood v. Strickland, 420 U.S. 308, 322 (1975), and set forth instead a standard that reviews "the objective legal reasonableness of an official's acts," Harlow, 457 U.S. at 819, because of the "substantial costs [that] attend the litigation of the subjective good faith

of government officials," including intrusive inquiries into officials' mental states that can be "peculiarly disruptive of effective government." Id. at 816, 817.

This case thus illustrates the "tension" that Justice Kennedy's concurring opinion in Siegert v. Gilley, 111 S.Ct. 1789, 1795 (1991), noted exists between Harlow's rationale, which eliminates judicial inquiry into subjective good faith and the disruptive, sweeping discovery that such an inquiry entails, and allowing plaintiffs to prove state of mind -- which as a question of fact is not well-suited for summary judgment -- when it is a substantive component of the constitutional right at issue.

As one court of appeals has observed, if Harlow results in

"attributing to the defendants the best intent they (objectively) could have under the circumstances, and asking whether the law at the time clearly establishes that persons with such an intent violate the Constitution," then "that would be the functional equivalent of eliminating all recoveries when a mental state is part of the definition of the wrong -- as it is in cases of racial discrimination, excessive punishment, and many other constitutional torts." Elliott v. Thomas, 937 F.2d 338, 344 (7th Cir. 1991). Justice Kennedy has accordingly proposed that the "heightened pleading standard is a necessary and appropriate accommodation between the state of mind component . . . and the objective test that prevails in qualified immunity analysis as a general matter." Siegert

v. Gilley, 111 S.Ct. at 1795 (concurring).

The federal appellate courts have adopted a variety of approaches, which are not altogether consistent, in attempting to reconcile the goal of resolving immunity questions as early as possible with the competing interest in allowing remedies for intentional constitutional wrongs.[1] This Court should review this issue of first impression and set forth the standards the lower courts are to uniformly apply in deciding qualified immunity claims in

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[1] See, e.g., Branch v. Tunnell, 937 F.2d 1382, 1385-87 (9th Cir. 1991); Elliott v. Thomas, 937 F.2d at 344-46; Siegert v. Gilley, 895 F.2d 797, 800-02 (D.C. Cir. 1990), aff'd on other grounds, 111 S.Ct. 1789 (1991); Collison v. Gott, 895 F.2d 994, 1001-1004 (4th Cir. 1990); Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 647-50 (10th Cir. 1988); Musso v. Hourigan, 836 F.2d 736, 743 (2nd Cir. 1988); Elliott v. Perez, 751 F.2d 1472, 1479-82 (5th Cir. 1985); see also United States v. Michigan, 940 F.2d 143, 154 n.7 (6th Cir. 1991).

cases arising out of constitutional rights containing state of mind elements.

II. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT IN REFUSING TO GRANT QUALIFIED IMMUNITY TO PRISON OFFICIALS WHO HAVE MADE THE CONSIDERED DECISION TO DENY OUT-OF-CELL EXERCISE PRIVILEGES TO A VIOLENTLY EXPLOSIVE PRISONER.

Review of this important novel issue is particularly appropriate in this case because the Fourth Circuit "has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup.Ct.R. 10.1(c). While this Court has never reviewed a qualified immunity claim in the setting of an alleged Eighth Amendment violation, the rationale of its prior decisions mandates reversal of the decision below.

A principal focus of the doctrine

of qualified immunity is on "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. . . ." Mitchell v. Forsyth, 472 U.S. 511, 528 (1985). In denying the officials' immunity claim in this case, however, the Court of Appeals made no finding that the officials violated clearly established law.

Rather, after stating that it, like other courts, has "never held that denial of out-of-cell exercise opportunities is per se unconstitutional cruel and unusual punishment" (App. at 122), and that "penological considerations may, in certain circumstances, justify [such] restrictions" (id. at 123), the court below refrained from deciding the immunity claim raised here, finding

instead that such a determination "would be better accomplished by a trial judge after a full hearing on the facts." (Id. at 125.) The Court of Appeals thus instructed the district court on remand to determine whether the prison officials violated clearly established law by conducting "[a] detailed review of the feasibility of alternatives in this case, such as solitary out-of-cell exercise periods, or the adequacy of in-cell exercise. . . ." (Id.)

The Fourth Circuit's express acknowledgment that "[w]e do not decide by this opinion the constitutionality of prison officials' actions here" (App. at 125), is in direct contravention of this Court's repeated emphasis on "the importance of resolving immunity questions at the earliest possible stage in litigation," Hunter v. Bryant, 112

S.Ct. 534, 536 (1991); see also Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987); Mitchell v. Forsyth, 472 U.S. at 526; Harlow v. Fitzgerald, 457 U.S. at 818, because "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." Siegert v. Gilley, 111 S.Ct. at 1793.

In refusing to address the validity of the conduct at issue here and remanding this case for a trial on the merits, the court below has subjected these officials to "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." Id. It is precisely these demands that the

doctrine of qualified immunity was designed to avoid, as the Fourth Circuit's detailed discussion of the government action challenged in this case (App. at 115-16) demonstrates that that action invoked no clearly established rights warranting the denial of the prison officials' immunity.

For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. at 640. Here, the Fourth Circuit noted that "in most circumstances withholding all exercise opportunities from a prisoner over an extended period of time violates the Eighth Amendment. Yet Mitchell's unmanageable, violent nature may present exceptional circumstances

here, justifying the deprivation." (App. at 123) (emphases added). The Fourth Circuit's remand of this case to determine whether such exceptional circumstances exist demonstrates the legitimacy of that question and that the actions challenged here did not violate clearly established law.[2]

Because "[s]uch officials as . . . prison wardens . . . routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them," Davis v. Scherer, 468 U.S. 183, 196 (1984), the Eighth Amendment "requires that neither judge nor jury freely substitute their

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[2] See Mitchell v. Forsyth, 474 U.S. at 535 n.12 ("where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law."); Anderson v. Creighton, 483 U.S. at 641 ("The same is true of [officials'] conclusions regarding exigent circumstances.").

judgment for that of officials who have made a considered choice." Whitley v. Albers, 475 U.S. 312, 322 (1986). Rather, qualified immunity "gives ample room for mistaken judgments," Malley v. Briggs, 475 U.S. 335, 343 (1986), and that protection is particularly broad in cases arising out of an Eighth Amendment claim, where "courts must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives." Whitley v. Albers, 475 U.S. at 322.

Yet the Fourth Circuit refused to grant qualified immunity until such an inquiry concerning the officials' reasonableness was made on remand. (App. at 125-26.) That holding is irreconcilable with this Court's Eighth Amendment decisions and similarly is in

conflict with this Court's decisions recognizing that qualified immunity principles do not require determining whether officials could have acted more reasonably. See Hunter v. Bryant, 112 S.Ct. at 537. This Court should grant review to address these conflicts and reverse the Fourth Circuit's decision.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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